

(18)
No. 89-542-CFX
Status: GRANTED

Title: Rudy Perpich, Governor of Minnesota, et al.,
Petitioners
v.
Department of Defense, et al.

Docketed:

September 26, 1989 Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Tunheim, John R.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 26 1989	G	Petition for writ of certiorari filed.
2	Sep 26 1989		Appendix of petitioner filed.
4	Oct 31 1989		Order extending time to file response to petition until November 29, 1989.
6	Nov 29 1989		REDISTRIBUTED. January 5, 1990
7	Nov 29 1989	X	Brief of respondent U. S. Department of Defense in opposition filed.
8	Jan 8 1990		Petition GRANTED. and the parties are directed to adhere to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondent must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on or before March 16, 1990. *****
9	Jan 26 1990		SET FOR ARGUMENT TUESDAY, MARCH 27, 1990. (1ST CASE)
10	Feb 2 1990		Joint appendix filed.
11	Feb 8 1990		Brief amici curiae of Iowa, et al. filed.
12	Feb 8 1990		Brief of petitioner Governor Perpich filed.
13	Feb 15 1990		Record filed.
		*	Certified copy of C. A. Proceedings, 2 volumes, received.
14	Feb 23 1990	D	Motion of National Guard Association of the United States, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for argument filed.
17	Feb 26 1990		Record filed.
		*	Certified copy of original record received.
16	Mar 2 1990		CIRCULATED.
15	Mar 5 1990		Motion of National Guard Association of the United States, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for argument DENIED.
18	Mar 6 1990	X	Brief of respondents U.S. Department of Defense, et al. filed.
19	Mar 6 1990	X	Brief amici curiae of Washington Legal Foundation, et al. filed.
20	Mar 6 1990	X	Brief amici curiae of National Guard Association of the United States, et al. filed.
21	Mar 6 1990	X	Brief amicus curiae of Firearms Civil Rights Legal Defense Fund filed.

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No. 89-542-CFX

Entry	Date	Note	Proceedings and Orders
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22	Mar 15 1990	X Reply brief of petitioner Governor Perpich filed.	
23	Mar 27 1990	ARGUED.	

89-542 (1)

Supreme Court, U.S.

FILED

SEP 26 1989

JEROME E. SPANIEL, JR.
CLERK

No. ____-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

RUDY PERPICH, as Governor of the State of Minnesota,
and THE STATE OF MINNESOTA, by its Attorney
General Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE,
et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT
(PART I)

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QUESTION PRESENTED

Can Congress abrogate the States' specifically reserved authority for militia training in the absence of a declared national emergency without violating the militia training clause of the United States Constitution, art. I, § 8, cl. 16?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following are respondents: United States Department of the Air Force, United States Department of the Army, National Guard Bureau, the Secretary of Defense, the Secretary of the Army, the Secretary of the Air Force, and the Chief of the National Guard Bureau.

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IN THE Supreme Court of the United States

OCTOBER TERM, 1988

No. _____

RUDY PERPICH, as Governor of the State of Minnesota,
and THE STATE OF MINNESOTA, by its Attorney
General Hubert H. Humphrey, III,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE,
et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari
issue to review the judgment and opinion of the United States
Court of Appeals for the Eighth Circuit, entered in the above-
entitled proceeding on June 28, 1989.

OPINIONS BELOW

The en banc opinion of the Court of Appeals for the Eighth
Circuit is reported at 880 F.2d 11, and is reprinted in the ap-
pendix hereto (Part I), p. A-1.

The panel opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the appendix hereto (Part II), p. A-63.

The memorandum decision of the United States District Court for the District of Minnesota (Alsop, J.) is reported at 666 F. Supp. 1319, and is reprinted in the appendix hereto (Part II), p. A-141.

JURISDICTION

Invoking federal jurisdiction under 5 U.S.C. § 702 and 28 U.S.C. §§ 1331, 2201 and 2202, the petitioners brought this suit in the District of Minnesota. On August 3, 1987, the District of Minnesota granted the respondents' motion for summary judgment and denied the petitioners' motion for summary judgment. See p. A-153.

On petitioners' appeal, a three-judge panel of the Eighth Circuit on December 6, 1988, reversed the judgment of the district court and remanded the matter for further proceedings consistent with the panel's opinion. See p. A-123. Respondents moved for rehearing *en banc*. On January 11, 1989, the Eighth Circuit granted respondents' motion for rehearing *en banc*, and vacated the court's opinion and judgment of December 6, 1988. See p. A-62.1. On June 28, 1989, the judgment of the district court was affirmed by the Eighth Circuit. See p. A-14.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cls. 15 and 16 provide:

The Congress shall have power . . .

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress

U.S. Const. art. 1, § 8, cl. 12 provides:

The Congress shall have power . . .

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years

10 U.S.C. §§ 672(b) and (d) (1982) provide:

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the

State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

* * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

10 U.S.C. § 672(f) (Supp. IV 1986) provides:

(f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

STATEMENT OF THE CASE

Respondents ordered members of the Minnesota National Guard to federal active duty for training missions in Central America pursuant to 10 U.S.C. §§ 672(b) or 672(d). Complaint, para. 16. Members of the Minnesota National Guard are also enlisted in the National Guard of the United States, a reserve component of the national armed forces. 32 U.S.C. §§ 101(4-7), 304; 10 U.S.C. §§ 101(11-12), 261, 3261, 8261 (1982 & Supp. V 1987). Petitioner Governor Perpich is commander-in-chief of the State's military forces pursuant to Minn. Const. art. V., § 3, and Minn. Stat. § 190.02 (1988). Complaint, para. 3. He would not have consented to one of the training missions but for the restrictions imposed by 10 U.S.C. § 672(f) (hereinafter "Montgomery Amendment"). Complaint, para. 19. If Petitioner Perpich objects to the location, purpose, type or schedule of future orders directed at members of the Minnesota National Guard for active duty training outside the United States during peacetime, he would withhold his consent to such orders. *Id.*, para. 21.

Petitioners prayed for the district court to declare the Montgomery Amendment unconstitutional and moved for summary judgment. *Id.*, prayer for relief at p. 7. They argued that the Montgomery Amendment violates U.S. Const. art. I, § 8, cl. 16 (hereinafter "militia training clause") because that clause expressly reserves to each State authority to train the National Guard, which is the modern-day militia, and thereby requires State consent to National Guard training exercises in peacetime.

Respondents moved to dismiss the complaint. They argued that State consent to National Guard training is not constitutionally required when the National Guard is ordered to active

federal duty. When in federal service, the National Guard is subject to Congress' plenary power under U.S. Const. art. I, § 8, cl. 12 (hereinafter "army clause"), to provide for the national defense, respondents contended. They further argued, citing the *Selective Draft Law Cases*, 245 U.S. 366 (1918), that the militia training clause does not constrain Congressional authority under the army clause.

On August 3, 1987, the district court, adopting respondents' theory, dismissed the action. See p. A-153.

On December 6, 1988, a divided panel of the Eighth Circuit reversed the district court's judgment and remanded the matter for further proceedings consistent with its opinion. See p. A-123. It held that the Montgomery Amendment is unconstitutional because the militia training clause requires State consent to peacetime training of the National Guard.

On January 11, 1989, the Eighth Circuit granted respondent's petition for rehearing *en banc* and vacated the court's panel opinion and judgment of December 6, 1988. See p. A-62.1.

On June 28, 1989, a divided Eighth Circuit *en banc* affirmed the judgment of the district court. See p. A-1. It upheld the Montgomery Amendment on the ground that the militia training clause does not limit congressional authority to train the National Guard when it is in active federal service and, therefore, State consent to training exercises is not constitutionally required. The Eighth Circuit *en banc* opinion relied in part on the *Selective Draft Law Cases* in deciding that the Montgomery Amendment does not infringe on State training authority. The *Selective Draft Law Cases* "made clear that the army clause is not limited by the militia clause," the majority opinion asserted. See p. A-11. Thus, when Guard units are ordered into federal service in their role as a reserve component of the federal armed forces, the militia clause is not

applicable, it added. See p. A-12-13. Therefore, according to the Eighth Circuit majority, the Montgomery Amendment is a constitutional exercise of Congress' army powers. See p. A-13.

The dissent argued, in part, that *Selective Draft Law Cases* merely held that Congress could require compulsory military service during wartime and did not support the majority's view. See p. A-25. Furthermore, it construed the *Selective Draft Law Cases* to require a "national exigency" before the federal government can exercise its army power to supersede reserve State authority over militia training. See p. A-40-42. Almost a third of the 49-page dissenting opinion focused on the framers' intent in adopting the militia training clause. It concluded that reserved State authority over the militia "represented [a] fundamental structural decision[] by the Framers" designed to insulate militia authority "from uncontrolled and potentially irresponsible short-term political reaction." See p. A-31.

REASONS FOR GRANTING THE WRIT

DECIDING THAT THE STATES' EXPRESS CONSTITUTIONAL AUTHORITY OVER PEACETIME NATIONAL GUARD TRAINING CAN BE NEGATED BY CONGRESS IS AN EXCEPTIONALLY IMPORTANT ERROR DISPLACING AN ASPECT OF STATE SOVEREIGNTY THAT SHOULD BE PROMPTLY CORRECTED.

1. The Eighth Circuit's Decision Is Exceptionally Important.

The Eighth Circuit made an exceptionally important decision by abrogating a power explicitly reserved to the States by U.S. Const. art. I, § 8, cl. 16. Because the case involves the important subject of federal-state relations coupled with the sensitive matter of governmental power to authorize National Guard training, the Eighth Circuit decision has implications for all the States and the federal government. A decision on such an issue, depriving the states of constitutionally-granted authority, should not remain unreviewed by this Court.

The decision that the States can be stripped of their authority regarding militia training is all the more egregious because the power is expressly conferred by the Constitution. "With rare exceptions, like the guarantee, in Article IV, § 3, of State territorial integrity, the Constitution does not carve out express elements of State sovereignty that Congress may not employ its delegated powers to displace." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985). The militia training clause, like article IV, § 3,¹ is one of those rare exceptions.

¹ U.S. Const., art. IV, § 3 requires State legislative consent for the formation of any State "by the junction of two or more states or parts of states"

The Montgomery Amendment should not be permitted to contravene "the general conviction that the Constitution precludes 'the National Government [from] devour[ing] the essentials of state sovereignty.'" *Id.* at 549 (citation omitted). This Court's repeated recognition "that state sovereignty is a fundamental component of our system of government" and that "the states possess constitutionally preserved sovereign powers," *id.* at 573-74, (Powell, J., dissenting), will be undermined by the Montgomery Amendment if this Court does not review and reverse the circuit court.

Although this Court denied a petition for a writ of certiorari to the United States Court of Appeals for the First Circuit in a similar State challenge to the constitutionality of the Montgomery Amendment, *Massachusetts v. United States Dept. of Defense*, 109 S.Ct. 1743 (1989), "denial of a writ of certiorari imparts no expression upon the merits of a case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). Thus, this Court has not addressed the merits of a challenge to Congressional abrogation of the States' expressly reserved power to authorize militia training.

The Court should address the constitutionality of the Montgomery Amendment now because military training authority is directly implicated in the circuit court's decision. The proper allocation of such authority is a sensitive governmental function that should not be the subject of multiple, prolonged and confusing litigation.

There is a realistic potential for intercircuit conflict on the constitutionality of the Montgomery Amendment. The Eighth Circuit panel decision was, before its vacation, directly in conflict with a decision in the First Circuit. *Dukakis v. United States Department of Defense*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub nom. Massachusetts v. United States Dept. of Defense*, 109 S. Ct. 1743 (1989). Thus, an intercircuit split has

occurred in the past and, therefore, is not a remote future possibility. Furthermore, the Court of Military Appeals concluded before enactment of the Montgomery Amendment that the gubernatorial consent requirement of 10 U.S.C. § 672(d) "has constitutional underpinnings" in the militia clause. *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977); accord *United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1978); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978). Thus, there is a real potential for a split between the Court of Military Appeals and the First and Eighth Circuits.

The exceptional importance of authoritatively resolving the validity of the Montgomery Amendment is indicated by the fact that 28 States participated as *amici* in the Eighth Circuit. See p. A-5, n.5. As respondents properly advised the Eighth Circuit, this matter encompasses "issues of exceptional practical and legal importance." Petition For Rehearing and Suggestion For Rehearing *En Banc* at 5. Furthermore, as respondents have observed, the emergence of conflicting court decisions on this issue "can be expected to spawn confusion and much litigation" *Id.* at 15, n.10. This case presents the Court with an opportunity to avoid needless confusion and litigation on a sensitive subject.

The circumstances presented to this Court in the earlier petition for a writ of certiorari are significantly different here and make the issue ripe for an authoritative review by the Court. In the earlier case, the First Circuit affirmed the judgment of the District Court upholding the Montgomery Amendment in a one-sentence opinion. *Dukakis v. United States Department of Defense*, 859 F.2d 1066 (1st Cir. 1988). In this case, the constitutionality of the Montgomery Amendment was independently analyzed in an extensive opinion by the circuit court. Furthermore, the dissenting opinion in the

Eighth Circuit case presents a careful review of historical materials evidencing the framers' intent in adopting the militia training clause. Thus, this Court's review of the validity of the Montgomery Amendment now would have the benefit of extensive prior consideration by the circuit court, a benefit not presented by the earlier petition.

2. There Are Strong Reasons To Believe The Eighth Circuit's Decision Was Wrong.

The Eighth Circuit erroneously framed the issue before it this way:

The issue, simply put, is this: when the State claims a right to control Militia training, and Congress claims, 'we're training the Army, not the Militia,' who wins?

See p. A-9.

By reducing the interplay of the militia training and army clauses to a semantical word game with a predictable winner, the Eighth Circuit oversimplified the issue before it and reached a wrong conclusion. A proper constitutional analysis would examine the text of the relevant provisions in light of the framers' intentions. *Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1874) (constitutional provisions construed "to express the intention of the framers"). However, the Eighth Circuit *en banc* opinion does not consider the framers' intent at all, and that intent is inconsistent with the circuit court's conclusion.

Neither the text of the militia training clause nor the framers' intent in drafting it support the circuit court's conclusion that the Montgomery Amendment is constitutional. The text, as the dissenters put it, "is an unambiguous command . . . which we cannot ignore." See p. A-32.

In an exhaustive examination of historical sources evidencing the framers' intent, the dissent found no indication that "the Framers believed the power to raise armies could supersede reserved state authority over the militia at will." See p. A-29. On the contrary, the framers' intent was to reach a workable compromise between advocates of strong federal control over State militias, who sought to assure the creation and maintenance of an effective national military force, and States' rights proponents, who feared excesses by a powerful standing army controlled by federal authorities. See p. A-19.

One of the resulting compromises was to divide State militia authority between federal and State governments. The federal government was authorized to arm, organize, and discipline the militia. It would also govern the militia when employed in federal service. However, the framers reserved to the States the appointment of officers and the authority of training the militia according to federal standards. This compromise is unambiguously incorporated into the text of U.S. Const. art. I, § 8, cls. 15 and 16.

The framers did not intend that either the State's reserved powers of appointment and/or its reserved power to authorize training could be usurped at will under the army power by transforming the State militia into a federal force for any reason or no reason without regard to whether or not national security was threatened. Such unrestrained federal authority would mean, as the dissenting opinion put it, that "the federal government could use the army power at will to make the militia a federal force under its plenary control, [and] the Militia Clauses could not serve their intended purpose to protect the states against potential oppression by the federal army." See p. A-30. A divided federal-State authority over the militia was intended to quiet the fear of some framers "that

if the militia did not exist to protect state interests, the army might be used by the federal government to oppress the states and their citizens." See p. A-29. Thus, the militia training clause expressly preserves an aspect of the States' sovereignty—their power to authorize militia training.

The States retain sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985). The power to authorize militia training not only was not transferred by the Constitution to the federal government, but instead was expressly reserved to the States.

The reliance of the national government on an effective National Guard available for federal service when required presents no obstacle to respecting the State's expressly reserved authority over National Guard training. The National Guard remains available for federal service for any constitutionally permissible purpose, which includes the execution of federal laws, suppression of insurrections and repelling invasions. U.S. Const. art. I, § 8, cl. 15.

Furthermore, the *Selective Draft Law Cases*, 245 U.S. 366 (1918), properly construed, authorize the use of the National Guard in cases of acknowledged "exigencies." The Court in *Selective Draft Law Cases* stated:

But the duty of exerting the [Army Clause] power thus conferred in all its plentitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the *exigencies* which would call it in part or in whole into play.

245 U.S. at 382-83 (emphasis added). Thus, the Army Clause may be invoked to train National Guard members whenever an

emergency is declared by Congress or, additionally, as the dissent suggested, the President. See p. A-40-42.

Nothing in the *Selective Draft Law Cases*, which merely upheld the federal government's authority to conscript male citizens during wartime, suggests that the militia training clause can be rendered superfluous whenever the federal government chooses to designate the National Guard as a federal entity and order that entity to engage in training.

The circuit court's reliance on the *Selective Draft Law Cases* for the proposition that "the army clause is not limited by the militia clause" is not well-founded. By construing the interplay of the two clauses to permit the army clause to checkmate the militia training clause, the circuit court opinion collides with this Court's obligation to construe constitutional provisions so that "none . . . suffer subordination or deletion." *Ullman v. United States*, 350 U.S. 422, 428 (1955). The Eighth Circuit's sweeping construction of the *Selective Draft Law Cases* eviscerates the militia training clause. This is especially remarkable in light of the narrow holding of the case—that wartime conscription is within Congressional authority—and its express language cautioning against "weakening or destroying" either state or federal powers under the militia and army clauses. *Selective Draft Law Cases*, 245 U.S. at 384.

The expressly reserved State powers in the Constitution were "designed to keep the balance between the States and the nation outside the field of legislative controversy." *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting). The Eighth Circuit, by upholding the Montgomery Amendment, misplaces explicit reserved State authority over militia training squarely into the federal legislative arena.

The interplay of the militia and army clauses has not been directly addressed by this Court for more than 50 years because until now Congress has not sought to remove the States' expressly reserved militia training authority. Now that Congress has overstepped its limited authority over militia training, it is time for the Court to revisit the subject.

CONCLUSION

In light of the Eighth Circuit's exceptionally important error, the significance of a uniform national construction of the interplay of the army and militia training clauses in the context of authorizing National Guard training, the significant potential for inter-circuit conflicts on this issue, and the opportunity presented here to avoid unnecessary and prolonged confusion, the Court should grant this petition.

Respectfully submitted,

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September 26, 1989

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 87-5345

Submitted: February 16, 1989

Filed: June 28, 1989

**Rudy Perpich, Governor of the State of Minnesota;
State of Minnesota, by its Attorney General
Hubert H. Humphrey, III,**

Appellants,

v.

**United States Department of Defense, United States
Department of Air Force, United States Department
of Army, National Guard Bureau, Caspar W. Weinberger,
Secretary of Defense; John O. Marsh, Jr., Secretary of
the Army; Edward C. Aldridge, Secretary of the Air Force;
Lt. Gen. Herbert R. Temple, Jr., National Guard Bureau,**

Appellees.

Commonwealth of Massachusetts,

AMICUS CURIAE

U. S. National Guard Assn.,

AMICUS CURIAE

**Appeal from the United States District Court for
the District of Minnesota.**

**Before McMILLIAN, Circuit Judge, HEANEY, Senior Cir-
cuit Judge, ARNOLD, JOHN R. GIBSON, FAGG, BOW-**

MAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges,
EN BANC.*

MAGILL, Circuit Judge.

In this opinion, we address a challenge to the constitutionality of the Montgomery Amendment, which restricts the power of state governors to withhold consent to federal deployment of the National Guard of the United States. We hold that the Constitution does not require gubernatorial consent to active duty for training of the National Guard of the United States. Based on the statutory system of dual enlistment and the relationship between the Constitution's army and militia clauses, we find the Montgomery Amendment to be a constitutional exercise of congressional power.

I.

In 1985 and 1986, several governors objected to deployment of National Guard personnel to Central America. The governors withheld (or threatened to withhold) their consent to federally ordered active duty missions by their States' National Guards. 10 U.S.C. § 672(b), (d) (1982).¹ In response,

* The HONORABLE GERALD W. HEANEY, a member of the original panel, assumed senior status on December 31, 1988. The HONORABLE DONALD P. LAY, Chief Judge, did not participate in the consideration or decision of this case.

¹ Reserve units and members of the National Guard of the United States may be activated "at any time * * * for not more than fifteen days a year," but not without the governor's consent:

At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty

Congress enacted the Montgomery Amendment, which prohibits the governors from withholding consent to active duty outside the United States because of objections to the location, purpose, type, or schedule of active duty. *Id.* § 672 (f) (Supp. IV 1986).²

Members of the Minnesota National Guard participated in three active duty training missions in Central America in January 1987. After the Guard returned, Governor Rudy Perpich, the Commander in Chief of the State's military forces, objected to defendants' ordering the Guard to active duty for training in Honduras.³ Because Perpich wanted to

under this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

10 U.S.C. § 672(b) (emphasis added).

An individual reservist may be ordered to and retained on active duty "at any time" with the consent of both the reservist and the governor of his state guard:

At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned. *Id.* § 672(d).

² The Montgomery Amendment, section 522 of the Defense Authorization Act for Fiscal Year 1987, provides:

The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

10 U.S.C. § 672(f) (Supp. IV 1986).

³ The defendants, the Departments of Defense, Army, and Air Force and their Secretaries, and the National Guard Bureau and

withhold consent to further orders, the Governor and the State of Minnesota filed this suit. Perpich sought a declaration of the governors' constitutional authority to withhold consent to peacetime training of the Guard outside of the United States. Perpich asked specifically for a declaration that the Montgomery Amendment infringes "the Authority of training the Militia" reserved to the States by the Constitution. U.S. Const. art. I, § 8, cl. 16. Perpich also sought to enjoin any federal order commanding members of the Minnesota unit of the National Guard to active duty for training outside of the United States without Perpich's consent.

The district court,⁴ in a well-reasoned opinion, held that the dual enlistment system, under which Guard members enlist and serve in both the state National Guard and the federal National Guard of the United States, was a necessary and proper exercise of Congress' power to raise and support armies. *Perpich v. United States Department of Defense*, 666 F. Supp. 1319, 1323 (D. Minn. 1987). The court also held that the States' authority to train the militia did not inhibit Congress' power to provide for active duty training of the National Guard of the United States without the governors' consent. *Perpich*, 666 F. Supp. at 1325; accord *Dukakis v. United States Department of Defense*, 686 F. Supp. 30, 38 (D. Mass.), *aff'd* 859 F.2d 1066 (1st Cir. 1988) (per curiam), *cert. denied*, 109 S. Ct. 1743 (1989). The court granted summary judgment to defendants, and Perpich appealed.

its Chief, are the individuals and entities authorized to order reserves to active duty under § 672(b) and (d). We take judicial notice that other members or units of the Minnesota Guard have been or may be ordered to active duty for reserve training in Central America.

⁴ The Honorable Donald J. Alsop, United States District Judge for the District of Minnesota.

A divided panel of this court reversed, holding that the Montgomery Amendment violated the constitutional reservation of state authority to train the Militia, and that National Guard personnel could not be ordered to active duty for training without the consent of the States unless the Congress or the President first declared a national security emergency or exigency. *Perpich v. United States Department of Defense*, No. 87-5345, slip op. (8th Cir. Dec. 6, 1988). On January 11, 1989, this court granted rehearing en banc, thus vacating the opinion of the panel. We now affirm the judgment of the district court upholding the constitutionality of the Montgomery Amendment.

II.

This case involves conflicting assertions of sovereignty by the state and national governments. Perpich⁵ claims the constitutional authority to withhold consent for National Guard training outside the United States in peacetime. The Department of Defense contends that, when Congress acts under its constitutional power to raise and support armies, it may authorize active duty to train reserve forces without infringing the States' authority over militia training. The Department of Defense also contends that a governor's decision to withhold consent based on objections to the location

⁵ The States of Colorado, Maine, Massachusetts, Ohio and Vermont appear jointly as amici curiae in support of appellants. The National Guard Association of the United States (supported by the states of Alabama, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Wisconsin, and the Adjutants General Association of the United States and the Enlisted Association of the National Guard of the United States), the Firearms Civil Rights Legal Defense Fund, and the Military Order of the World Wars appear separately as amici curiae in opposition to appellants.

or purpose of Guard training would infringe the national government's exclusive authority to conduct the national defense.

Today, the *militia* (with a number of exceptions of no importance here) consists of all able-bodied male citizens ages 17 to 45 and of female citizens who are commissioned officers of the National Guard. 10 U.S.C. § 311(a). The militia is divided into two classes, the *organized militia* and the *unorganized militia*. *Id.* § 311(b). The *National Guard* is the organized militia of the several States. *Id.* § 101(10), (12).⁶ The *National Guard of the United States* (NGUS) consists of the members of the National Guard or organized militia who are also enlisted in a reserve component of the United States Army or Air Force. *Id.* § 261.⁷

⁶ "The term 'National Guard' means the Army National Guard and the Air National Guard." *Id.* § 101(9). "Army National Guard" means:

that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

- (A) is a land force;
- (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;
- (C) is organized, armed, and equipped wholly or partly at Federal expense; and
- (D) is federally recognized.

Id. § 101(10). "Air National Guard" defines a like air force. *Id.* § 101(12). Parallel definitions are found at 32 U.S.C.A. § 101(4) (Army National Guard), (6) (Air National Guard).

In this opinion we use "the Guard" to refer generally to the dually enlisted organized militia, adhering elsewhere to current statutory definitions in referring to the National Guard of the several States and the National Guard of the United States.

⁷ "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard." 10 U.S.C. § 101(11). "'Air National Guard of the United States' means the reserve component of the Air Force all of whose members are members of the Air National Guard." *Id.* § 101(13).

In 1933, Congress established the *National Guard of the United States* as a component of the Army of the United States. Act of June 15, 1933, ch. 87, § 5, 48 Stat. 155. The National Guard of the United States consisted of the federally recognized members and units of the National Guard of the several States. *Id.* The 1933 Act created a *dual enlistment system*, *id.*, §§ 7-11, 48 Stat. 156-57, whereby "an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States, a reserve component of the U.S. Army." *Johnson v. Powell*, 414 F.2d 1060, 1063 (5th Cir. 1969). The President was authorized to order any or all units or members of the National Guard of the United States into active military service, if Congress first declared a national emergency and authorized the use of armed land forces in excess of the number of regular troops. Act of June 15, 1933, ch. 87, § 15, 48 Stat. 160. In establishing the National Guard of the United States, Congress invoked its army clause powers. H.R. Rep. No. 141, 73rd Cong., 1st Sess. 3-4 (1933); see generally Weiner, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 187 (1940).

In 1952, Congress enacted the legislative forerunners of 10 U.S.C. § 672(b) and (d) as part of a comprehensive strengthening of the armed forces' reserve components. Armed Forces Reserve Act of 1952, ch. 618, § 233(c), (d), 66 Stat. 481, 490. See S. Rep. No. 1795, 82nd Cong., 2d Sess. (1952), reprinted in 1952 U.S. Code Cong. & Admin. News 2005. The Army National Guard of the United States and the Air National Guard of the United States were designated as reserve components in the Ready Reserve of the Army and Air Force, respectively. Armed Forces Reserve Act of 1952, §§ 202, 208(c), 66 Stat. at 483-84.

Today, Congress authorizes active reserve duty for the National Guard of the United States in a variety of circum-

stances.⁸ The Army and Air National Guard of the United States, established and maintained under Congress' army power, function as reserves in the United States Army and Air Force "to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires." 10 U.S.C. § 262.

Under the "Total Force" structuring of American military forces, reserve components, including the National Guard of the United States, are fully integrated with regular active forces in the national defense. See H.R. Rep. No. 1069, 94th Cong., 2d Sess. 325, reprinted in 1976 U.S. Code Cong. & Admin. News 1034, H.R. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983). For example, the Army National Guard of the United States provides forty-six percent of the combat units and twenty-eight percent of the support forces of the total Army. The Army National Guard of the United States would provide eighteen of the twenty-eight army divisions, wholly or in part, in the event of full mobilization. The Air National

⁸ In addition to the provisions of § 672(b) and (d), Reserves may be ordered to active duty in the following circumstances:

reserves may be ordered to active duty "in time of war or national emergency declared by Congress," for up to six months beyond the duration of the war or emergency, 10 U.S.C. § 672(a);

active duty for up to twenty-four months is authorized if the President declares a "national emergency," *id.* § 673(a);

the President may order a reservist to active duty for up to twenty-four months, if performance of his statutory reserve obligation has been delinquent or unsatisfactory, *id.* § 673a(a);

active duty for up to ninety days is authorized if the President "determines it is necessary to augment active forces for any operational mission," *id.* § 673b(a); and

commissioned officers of the Army National Guard of the United States may be ordered, with their consent, to active duty in the National Guard Bureau, *id.* § 3496(a).

Guard of the United States provides seventy-three percent of air defense interceptor forces, fifty-two percent of tactical air reconnaissance, thirty-four percent of tactical air lift, twenty-five percent of tactical fighters, seventeen percent of aerial refueling, twenty-four percent of tactical air support, and other forces. Supp. Jt. App. at 5 (reprinting *Hearings On Federal Authority Over National Guard Training Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Service*, 99th Cong., 2d Sess. (1986) (testimony of James H. Webb, Jr.)).

Article I, section 8, clause 12 gives Congress the power "to raise and support Armies * * * ." Clause 16 "reserv[es] to the States respectively the Authority of Training the Militia according to the discipline prescribed by Congress." Minnesota asserts its sovereignty over the organized militia, legally constituted as the Minnesota Units of the Army and Air National Guards. Defendants assert their authority over enlisted members of the National Guard of the United States. We consider whether Congress' qualification of the governor's consent provisions in section 672 infringes the States' "Authority of training the Militia according to the discipline prescribed by Congress." The issue, simply put, is this: when the State claims a right to control Militia training, and Congress claims 'We're training the Army, not the Militia,' who wins?

The authority given to Congress by the army clause is plenary and exclusive. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1872). In the *Selective Draft Law Cases*, 245 U.S. 366 (1918), the Court observed that "complete authority" over the "army sphere" was "conferred in all its plenitude" to Congress, with the exertion of that power "wisely left to depend upon the discretion of Congress as to the arising of

the exigencies which would call it in part or in whole into play." 245 U.S. at 382-83. More recently, the Court has observed that "the constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The dual enlistment system, under which Guard members enlist and serve in both a state National Guard and the federal National Guard of the United States, is a necessary and proper exercise of Congress' army power. *Perpich*, 666 F. Supp. at 1323. See also *Dukakis v. United States Department of Defense*, 686 F. Supp. 30 (D. Mass.), *aff'd*, 859 F.2d 1066 (1st Cir. 1988) (per curiam); *Johnson v. Powell*, 414 F.2d 1060, 1063 (5th Cir. 1969); *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wa. 1968). Congress' establishment of the ready reserve and authorization of active duty, for training or otherwise, also falls within the lawful scope of the army power, as an exercise of congressional discretion in prescribing the exigencies of military training and discipline. See *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

Here Guard units were ordered into federal service for training in Central America in their role as the National Guard of the United States, a ready reserve component of the United States Army. The statutes authorizing this federal action are statutes grounded upon the army clause. These actions are beyond the reach of the militia clause.

While we could well conclude at this point, the vigorous argument of *Perpich* makes it proper that we further consider the scope of the militia clause.

III.

In the *Selective Draft Law Cases*, the Supreme Court upheld Congress' authority to draft individuals into the United States

Armed Services, notwithstanding their status as National Guard members already in the service of the United States. The Court held that Congress' power to conscript for the army under its authority to raise and support armies and to declare war was not confined to the express provisions for calling forth the militia. The Court reasoned that the one delegation of power to Congress (to call forth the militia) did not circumscribe the operation of another delegated power (to raise armies). 245 U.S. at 384.

Thus, the Supreme Court has made clear that the army clause is not limited by the militia clause:

There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision.

* * * But because under the express regulations the power was given to call [the Militia] for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its

potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both.

245 U.S. at 383-84. *Cox v. Wood*, 247 U.S. 3, 6 (1918), further explained the relationship between the two clauses:

[T]he constitutional power of Congress to compel the military service which the assailed law commanded was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia, found in the Constitution.

Looking particularly to the *Selective Draft Law Cases*, the district court here, as well as that in *Dukakis*, concluded that the states' authority reserved in the militia clause does not apply to the period during which members are on active duty as a part of the National Guard of the United States. The

Dukakis court made it clear that it did not read the *Selective Draft Law Cases* as a sweeping declaration that Congress is, in all circumstances, authorized by the army clause to bypass the reservation of power to the states in the militia clause. Faced with circumstances identical to those here, however, *Dukakis* held:

Nevertheless, guided by the decisions in the dual-enlistment cases as well as *Selective Draft Law Cases*, I conclude that the reservation of power to the states over "the Authority of training the Militia according to the discipline prescribed by Congress," expressed in the Militia Clause, does not override the legitimately exercised power of Congress "[t]o raise and support Armies."

686 F. Supp. at 37. As in *Dukakis*, the district court in *Perpich* held that the dual enlistment system is a valid exercise of congressional power under the army clause and the necessary and proper clause. Because the authority to provide for national defense is plenary, the militia clause cannot constrain Congress' authority to train the Guard as it sees fit when the Guard is operating pursuant to the army clause. *Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319, 1323-24 (D. Minn. 1987). As the militia clause does not limit Congress' authority to train the National Guard of the United States while it is in active service, the gubernatorial veto is not constitutionally required. *Id.* at 1324. We are satisfied that the district court was correct in this holding.

Congress' army power is plenary and exclusive. The reservation to the States of authority to train the Militia does not conflict with Congress' authority to raise armies for the common defense and to control the training of federal reserve forces. The Montgomery Amendment is a constitutional exercise of Congress' army powers.

The judgment of the district court is affirmed.

HEANEY, Senior Circuit Judge, with whom McMillian, Circuit Judge, joins, dissenting.

I. Introduction

With a few strokes of the word processor, the majority has written the Militia Clause out of the United States Constitution. In so doing, it contradicts the clear intent of the founding fathers, who believed that state control over elements of the military was essential to a free and peaceful republic. To this end, they gave the states a degree of power over the militia, which they intended to be a significant element of our national defense. The majority ignores the unambiguous language of the Constitution, and disregards the historical construction given to the Militia Clause and the Army Clause by the three branches of the federal government and the states. The plain and unassailable fact is that, until Congress tacked the Montgomery Amendment on to a defense appropriations bill, it was not responsibly asserted that Congress had the power under the Constitution to require the National Guard to participate in peacetime training missions without the consent of the governor of the affected state.

The majority relies on the *Selective Draft Law Cases*, 245 U.S. 366 (1918), for the proposition that the Militia Clause imposes no limits on the power of Congress to declare war and raise armies. It neglects to note, however, that in those cases the Supreme Court merely held that Congress could require compulsory military service during wartime. The Supreme Court neither held nor suggested in that or any other case that Congress could require the National Guard to engage in training missions during peacetime without gubernatorial consent.

The majority places great reliance on the 1933 amendments to the National Defense Act. In that legislation, Congress

determined that the Army of the United States would consist of the regular Army, the National Guard of the United States, the state National Guard while in the service of the United States, the Officer Reserve Corps, the organized Reserve and the enlisted Reserves. It adopted the amendments to alleviate the necessity of drafting individual members of the National Guard into the army by allowing them to be called into service in whole units in the "*event of war or other national emergency so declared by Congress.*" The act states in section 111 that:

*When Congress shall have declared a national emergency and shall have authorized the use of armed land forces * * * the President may * * * order into the active military service of the United States, to serve therein for the period of the war or emergency, * * * any or all units and the members thereof of the National Guard of the United States.*

48 Stat. at 160. In the absence of war or national emergency, Congress left state control over the militia intact.

The majority's final argument is that the requirements of the modern Army are such that the Defense Department must have absolute power to order the National Guard to participate in peacetime training without gubernatorial consent. This assertion is not supported by any facts. To the contrary, the record shows that the efficiency of the National Guard has not been affected at all by the refusal of one or more governors to consent to a particular mission. Moreover, if in the future there is a danger that non-consent would affect our national security, a national emergency may be declared, as President Reagan did during the recent raid on Libya. *See Exec. Order No. 12,543, reprinted in Dept. St. Bull. 37-38 (March 1986).* This is a small price to pay for compliance with the Constitution.

I initially turn to the intent of the framers.

II. *The Intent of the Framers*

A. *The Militia Clauses*

The military power of the United States is based on a system of checks and balances. The Framers divided authority over the military, not only between the coordinate branches of the federal government, but also between the federal and state governments.

The latter division is emphasized in several ways. First, because of the Framers' fear that a large standing army would lead to military abuses by the federal government, state militias were intended to comprise the bulk of the nation's defensive force. Second, control over these militias was explicitly shared between the federal government and the states. (The states were to appoint the militia's officers and to control the actual training of militiamen.) Third, while the Framers did not want the states to make positive national policy in the areas of defense or foreign relations matters,¹ they did intend the states to use their control over the militia to prevent the federal government, except in circumstances where national security was threatened, from using state troops in military undertakings objectionable to the states and their citizenry.

Under the Articles of Confederation, the states were required to "keep up a well regulated and disciplined militia * * * ." U.S. Arts. of Confed. art. VI. The central government had power to declare war and the supervisory authority

¹ The Constitution provides that "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; * * * keep Troops, or Ships of War in time of peace, enter into any Agreement or Compact with another State, or with a Foreign Power, or engage in War * * * ." U.S. Const. art. I, § 10, cls. 1, 3.

to order the states to produce quotas of armed and trained troops. *Id.*, art. IX. This system proved unworkable. The states had too much independent power to resist the requests of the central government. The troops provided were often inadequately trained and equipped and thus difficult to coordinate into a cohesive and effective force.

Thus, as the delegates assembled during the summer of 1787 to draft a more viable instrument of government, a pressing objective was the creation of a stronger, more reliable armed force. This aim was widely shared. The effort to find a specific solution, however, proved extremely divisive. From the outset, it was agreed that the problem would not be solved by the creation of a large, federally controlled standing army. The Framers identified such a force with British tyranny, potential oppression of states and individual citizens, and expensive, unpopular military adventures.² Thus, while the Framers would ultimately provide for a standing army, they would limit its power by declaring that military appropriations had to be approved every two years. U.S. Const. art. I, § 8, cl. 12. More importantly, for the purposes of this discussion, the Framers stated their intent to have state militias

² See Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493, 1507-1541 (1969) (Friedman). Indeed, as delegate Edmund Randolph noted at the Virginia ratifying convention, "there was not a member of the federal convention who did not feel indignation" at the idea of a standing army. 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401 (1901) (Elliot). See also Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 924 (1988) (Hirsch); Comment, *The Constitution and the Training of National Guard Officers: Can State Governors Prevent Uncle Sam From Sending the Guard to Central America?*, 4 J. L. & Pol. 597, 600, 601 (1988) (authored by P. Fish) (Comment).

provide for the nation's basic defense, with reliance on a standing army only as a last resort.³

As a corollary to the decision to rely largely on the militia for the nation's defense, it was believed necessary to provide a degree of federal control over these forces in order to achieve military effectiveness. The Convention rapidly agreed that the state militias would be placed under the control of the federal government in emergency situations, such as when insurrection or invasion was threatened, or when the militias were needed to enforce the laws of the country. See U.S. Const. art. I, § 8, cl. 15 (Clause 15) ("Congress shall have the power . . . [t]o provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions . . .").⁴ However, in other cases, the degree

³ As the Supreme Court noted in *United States v. Miller*, 307 U.S. 174, 179 (1939), "The sentiment of the time [of the ratification of the Constitution] strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through the Militia—civilians primarily, soldiers on occasion." See also Hirsch, *supra* note 2, at 924. Apparently, this view was a longstanding one, for Hirsch notes that militia "did the bulk of the fighting, often with success, in the War of 1812, the Mexican-American War, the Civil War (for both the Confederacy and the Union), and the Spanish-American War." *Id.* at 943. Hirsch points out that for the duration of the nineteenth century, "the militia remained the primary military force of the country." *Id.* at 944. "By 1898," he notes, "the regular army had 18,000 troops, compared to 115,000 militiamen." *Id.*

⁴ The United States, at the time the Constitution was ratified, was a nation of extreme isolationist sentiment. According to one noted commentator, "[P]eace was expected to be the customary state of the new nation. America would avoid aggressive war abroad and enjoy in turn 'an insulated situation' from the great powers of Europe This placid view of foreign relations precluded any explicit consideration of the use of American force abroad, except for defensive naval action" W. T. Reveley, *War Powers of the President and Congress* 61 (1981).

of control the federal government would exercise over state militias was a point of contention.

Nationalist delegates believed in strong federal control of the state militias in order to create a dependable, coordinated defensive force.⁵ States-rights delegates profoundly opposed such federal power.⁶ These delegates voiced fears that powerful federal authority over the state militias would, like the existence of a large standing army, lead to military abuses by the new government. They particularly feared that such authority would allow the federal government to tyrannize defenseless individual states and their citizens⁷ and could

⁵ Early in the Constitutional Convention, for example, Alexander Hamilton presented a proposal urging "the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them." See J. Madison, *Notes of Debates in the Federal Convention* 164 (Hunt 1920). The Convention ignored Hamilton's proposal.

⁶ Madison's notes from the Federal Convention indicate the strong opposition many delegates voiced to giving the federal government too much control over the militia.

Delegate Oliver J. Elsworth of Connecticut:

The whole authority of the militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power.

He thought the [general] Authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. It must be vain to ask the States to give the Militia out of their hands.

Delegate John Dickinson of Delaware:

We are come now to a most important matter, that of the sword. His opinion was that the States never would nor ought to give up all authority over the Militia. He proposed to restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia.

Madison's *Notes of the Federal Convention*, reprinted in, S. Rep. No. 695, 64th Cong., 2d Sess. 33 (1917) (*The Militia*).

⁷ Delegate Elbridge Gerry of Massachusetts feared that federal control over the militia would "enslave the states" and lead to a "system of despotism." *The Militia*, *supra* note 6, at 31, 33.

leave the states without the means to meet their own public needs.⁸

The debate between these factions was vigorous, for neither extreme had sufficient support at the Convention for its position to prevail.⁹ After several months of discussion and many days of hard-fought exchange on the floor of the Convention, delegates, such as George Mason, began to seek a compromise which would provide the federal government with sufficient control over the militia to meet its defensive needs, while at the same time assuring the states sufficient authority to check the potential abuse of military power by the federal government.¹⁰

On August 21, 1787, the Convention was presented with a workable compromise. The new proposal provided the federal government the authority "[t]o make laws for organizing,

⁸ Madison's notes contain the following:

Mr. [Roger] Sherman [of Connecticut], took notice that the States might want their militia for defense [against] invasions and insurrections, and for enforcing obedience to their laws.

Id. at 34.

⁹ See Friedman, *supra* note 2, at 1512-20.

¹⁰ The power of states-rights delegates to exact significant concessions from the nationalist delegates is demonstrated in the course of the debates at the Federal Convention. Mason offered three successive proposals to the Convention, each providing the states more authority over the militia than the last. Mason's final proposal sought to provide the federal government "regulatory" authority over the militia insofar as this was necessary to establish uniformity in training and arms so that the state forces could be melded into a cohesive force when the need arose. In the states' interest, Mason proposed that this federal regulatory authority would be limited to one-tenth part of each year, that appointment of officers would be in state hands, and that the states would be exempt from federal authority whenever they needed to use their militia on state business. This, however, did not satisfy the states-rights delegates, and the matter was referred to a central committee for resolution. *The Militia, supra* note 6, at 31-35.

arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the U.S.," while concurrently "reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by the U. States."¹¹ This compromise, with minor stylistic changes, was ultimately approved by the Convention. U.S. Const. art. I, § 8, cl. 16 (Clause 16).

Delegate Hamilton declared that the authority to appoint officers was given to the states in order to secure for them "a preponderating influence over the militia." *The Federalist No. 29*, at 185 (A. Hamilton) (J. Cooke ed. 1961) (Cooke). Moreover, the debates indicated that the training clause was retained in the text of the Constitution to ensure that the power to "organize, arm, and discipline" state forces given the federal government by the Militia Clauses did not surreptitiously extend federal control over the actual training of the militia.¹²

¹¹ *The Militia, supra* note 6, at 34 (emphasis added).

¹² Clause 16 provides Congress with the power to "discipline" the militia and reserves to the states "the Authority of training the Militia according to the discipline prescribed by Congress." Amicus curiae, the National Guard Association of the United States, argues that the term "discipline" provides a constitutional basis for federal control over the training process.

During the debates at the Constitutional Convention, Delegate Sherman suggested that the clause relating to training should be deleted, because he believed it "unnecessary." He believed that the states would obviously retain this authority unless they specifically ceded it to the federal government. *The Militia, supra* note 6, at 35.

In response, Delegate Elsworth cautioned Sherman on this point. Madison's notes contain the following:

Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be

While this compromise would ultimately win the approval of a majority of the states present at the Convention, many states-rights advocates believed that the plan still granted the federal government too much authority. A recurrent claim was that the proposed clause allowed the federal government to abuse its military power by sending citizens far from home for indefinite periods in furtherance of military schemes objectionable to the states.¹³

so expounded as to include all power on the subject.

Id. After hearing Elsworth, Mr. Sherman withdrew his motion to delete the training clause. *Id.*

Moreover, the debates at the Constitutional Convention indicate the power to *discipline*, at its broadest level of interpretation, means the power to prescribe *methods* of training, *rules* of conduct for the militia, *penalties* for the violation of such rules, and the *means to administer these penalties*. This power was believed necessary to assure potential coordinated movement on the field of battle. It also assured the federal government of troops who uniformly understood military rules of conduct and who understood that they were uniformly subject to the same penalties for infraction of these rules. See *The Militia*, *supra* note 6, at 35; see also *Perpich v. United States Dep't. of Defense*, 666 F. Supp. 1319, 1325 n.9 (D. Minn. 1987).

¹³ In a newspaper article urging the state of Maryland not to ratify the Constitution, Luther Martin, a delegate to the Federal Convention from that state, declared the proposed system would enable the government:

wantonly to exercise power over the militia, to call out an unreasonable number from any particular state without its permission, and to march them upon and constitute them in remote and improper services. * * * In the proposed system the general government has a power not only without the consent but contrary to the will of the state government, to call out the whole of its militia, without regard to religious scruples, or any other consideration, and to continue them in the service as long as it pleases, thereby subjecting the freemen of a whole state to martial law and reducing them to the situation of slaves.

Letter of Luther Martin in *The Maryland Journal*, March 18, 1788, reprinted in, *The Militia*, *supra* note 6, at 119; see also Re-

Supporters of the compromise, in response, assured potential opponents that the national government would only send the militia away from home in emergencies, such as when invasion or rebellion was threatened, or when there was a need to execute the laws. See *The Federalist No. 29*, Cooke at 187. In other situations, they asserted, the states and the people would assure that the federal government did not abuse its control of the militia. Hamilton emphasized that the militia were under the "preponderating influence" of the states. *Id.* at 186. Thus, he continued, "What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits, and interests?" *Id.* Hamilton concluded that, if the federal government attempted to send state troops on such adventures, its action would be based not on authority granted in the Constitution but rather on "imagined intrenchments of power." He believed that the states and the people would not tolerate such clear violations of the law.¹⁴

marks of Luther Martin before the Maryland House of Representatives, November 20, 1787, *id.* at 117-118. Similar fears were also expressed at the Pennsylvania ratifying convention. See *Pennsylvania and the Federal Convention* 568 (McMaster & Stone ed.).

¹⁴ Specifically, Hamilton declared that if the central government attempted such an abuse:

whither would the militia, irritated by being called upon to undertake a distant and distressing expedition for the purpose of riveting the chains of slavery upon a part of their countrymen: direct their course, but to the seat of the tyrants who had meditated so foolish as well as so wicked a project; to crush them in their imagined intrenchments of power, and to make them an example of the just vengeance of an abused and incensed people?

The Federalist No. 29, Cooke at 186 (emphasis added).

Madison, in like manner, declared that the authority of the states "as coequal sovereigns," together with the political power of the people, would form a significant check on the potential use of state militias for military adventures by the federal government. He stated:

Can we believe that a government of a federal nature, consisting of many coequal sovereigns, and particularly having one branch chosen from among the people, would drag the militia unnecessarily to an immense distance. This, sir, would be unworthy of the most arbitrary despot. They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, and drawing on themselves the general hatred and detestation of their country.

3 Elliot, *supra* note 2, at 381-82.

B. The Guarantee of Republican Government Clause

The Guarantee of Republican Government Clause provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

During the ratification debates, many of the delegates to the state conventions feared that the federal power to suppress domestic violence in individual states provided by this clause, together with the federal power over the militia set forth in Clauses 15 and 16, posed a serious threat to the states in the form of unchecked federal military power. James Madison responded forcefully to these suggestions and, in so doing,

provided clear support for the principle that reserved state authority over the militia was designed as an explicit check on the potential abuse of military power by the federal government.

In the Virginia convention, Madison stated:

The authority of training the militia, and appointing the officers, is reserved to the states. Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repel invasions: *these are the only cases wherein they can interfere with the militia* * * * .

3 Elliot, *supra* note 2, at 90 (emphasis added).

Several days later, Patrick Henry declared that Clauses 15 and 16, together with the Guarantee of Republican Government Clause, gave the federal government "unbounded control over the national strength" and "unequivocally relinquished" the states' control over their militias. *Id.* at 422-24. In like manner, William Grayson repeatedly argued that under the proposed Constitution, Congress could call out the militia whenever it desired and thus there was "no check" on federal control over the militia. *Id.* at 417-18, 421.

In response, Madison reasoned that practical necessities required dividing power over the militia between the federal government and the states. Following from this, he continued:

If [power over the militia] must be divided, let him [Henry] show a better manner of doing it than that which is in the Constitution. I cannot agree with the other honorable gentleman [Grayson], that there is no check. *There is a powerful check in that paper. The state governments are to govern the militia when not called forth for general national purposes; and the Congress is to*

govern such part only as may be in the actual service of the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the Service of the United States. *It is, then, clear that the states govern them when they are not.*

Id. at 424 (emphasis added).

C. The Second Amendment

The second amendment to the Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

This amendment was intended to reassure states-rights advocates who feared that the power of a large federal standing army would diminish the "security of a free state." The second amendment guaranteed the perpetual existence of a viable militia as a continued check on the military power of the federal government. As the Supreme Court stated, "*With the obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. [The second amendment] must be interpreted and applied with this in view.*" *United States v. Miller*, 307 U.S. at 178 (emphasis added).¹⁵

¹⁵ For further evidence supporting this view of the second amendment, see 1 *Annals of Congress*, 749-52, 766-67 (J. Gales, ed. 1789); 1 S. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* App. 300 (1803); 3 J. Story, *Commentaries on the Constitution of the United States* §§ 1890-91 (1833); Note, *Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters*, 39 Case W. Res. L. Rev. 165 (1988-89) (*Should I Stay or Should I Go*).

D. The Framers' View of the Interplay of the Army and Militia Powers

The Constitution provides Congress with the power "To Raise and support Armies * * *," U.S. Const. art. I, § 8, cl. 12, and the power "To make all Laws which shall be necessary and proper to carry into Execution [these powers] * * * ." *Id.*, cl. 18.¹⁶

In terms of the militia, Clause 15 provides that Congress shall have the power:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions * * * .

Clause 16 gives Congress the further power:

To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, *reserving to the States respectively*, the Appointment of the Officers, and *the Authority of training the Militia* according to the discipline prescribed by Congress.

Id. (emphasis added).

In *The Federalist No. 23*, Alexander Hamilton discussed the scope of the Constitution's Army Clause in the following terms:

¹⁶ There are other references to the militia in the Constitution. Art. II, § 2, provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States * * * .

Amendment V provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * * .

The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of **national exigencies**, or the correspondent extent and variety of the means which may be necessary to satisfy them. **The circumstances that endanger the safety of nations** are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defense.

• • • •

Whether there ought to be a Federal Government intrusted with the care of the common defence, is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to the complete execution of its trust. And unless it can be shown, that the **circumstances which may affect the public safety** are reducible within certain determinate limits; unless the contrary of this proposition can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the formation, direction or support of the **NATIONAL FORCES**.

The Federalist No. 23, Cooke at 147-48.

The government asserts, and the majority implicitly accepts the view, that this passage indicates the Framers believed the power to raise armies could supersede reserved state authority over the militia at will. I am unable to find a word in discussions leading to the adoption of the Militia Clause that supports this interpretation.

First, in this essay, Hamilton was writing of the "army power." There is no reference—of any kind—in *The Federalist No. 23* to the interaction of the army power with the militia power. There is no reference to the militia or to the Militia Clauses at all. Second, when Hamilton discusses the militia power in *The Federalist No. 29*, he directly contradicts the interpretation the government gives *The Federalist No. 23*.

Strange as it may now seem, the Framers feared that if the militia did not exist to protect state interests, the army might be used by the federal government to oppress the states and their citizens.¹⁷ Thus, Hamilton, in *The Federalist No. 29* (along with Madison in *The Federalist No. 46*), declared that an essential purpose behind the states' reserved authority over the militia was to guard against the dangers of the federal army.¹⁸

¹⁷ See *supra* note 7.

¹⁸ Specifically, Hamilton declared that a strong militia obviated the need for a potentially oppressive federal army:

[I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and in the use of arms, who stand ready to defend their own rights and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army; the best possible security against it, if it should exist.

The Federalist No. 29, Cooke at 184-85.

Next, responding to the argument that the Constitution's Militia Clauses provided the federal government the power to oppress the states with their own militias, Hamilton continued:

Hamilton *could not have meant* that the Army Clause has the power to supersede the reserved state authority over the militia at will. If the federal government could use the army power at will to make the militia a federal force under its plenary control, then the Militia Clauses could not serve their intended purpose to protect the states against potential oppression by the federal army.

Given the basic nature of this contradiction (and the fact that *The Federalist No. 23* does not even discuss the militia), it is likely that Hamilton was simply writing about the broad authority of the army power to serve the national defense, without reference to the militia power.

There is something so far fetched and so extravagant in the idea of danger from the militia, that one is at a loss to treat it with gravity or with raillery * * *. What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary; while the particular States are to have the *sole and exclusive appointment of the officers*? If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the Federal Government, the circumstances of the officers being in the appointment of the States ought at once to extinguish it. *There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.*

Id. at 185 (emphasis added).

In a similar vein, Madison wrote:

*Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger * * *. To these [a standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.*

The Federalist No. 46, Cooke at 321 (emphasis added).

Alternatively, *The Federalist Nos. 23 and 29* can be read together to allow the army power to supersede the militia power in more tightly confined circumstances. Hamilton, in *The Federalist No. 23*, speaks of the broad and unhindered sweep of the army power very clearly in the context of unforeseeable "*national exigencies*," or, phrased in other ways, in terms of the "*circumstances that endanger the safety of nations*," or "*circumstances which may affect the public safety*." Clearly, these phrases are significant to Hamilton, and by reading such a "national exigency" as a necessary requirement before the Army Clause can supersede state authority over the militia in peacetime, the seemingly contradictory messages of *The Federalist No. 23* and *The Federalist Nos. 29 and 46* are harmonized.

If the authority of the Army Clause to supersede the reservation of state authority in the Militia Clauses is limited to "national exigencies" or "circumstances that endanger the safety of the nation," federal power over the militia can only "trump" the state power when the whole union, or the national interest, is in some way threatened. If such a threat did not exist, the states would then be protected from the oppressive exercise of federal authority by the Militia Clauses.

Certain powers, such as reserved state authority over the militia, were enumerated in the Constitution in order to be insulated from uncontrolled and potentially irresponsible short-term political reaction. Such powers represented fundamental structural decisions by the Framers, based on their view of political society. They realized that, unless insulated, these powers could be eliminated in the heat of the moment by ill-considered political reactions. *See The Federalist No. 10* (J. Madison).

III. *The Text of the Constitution*

The plain language of Article I, Section 8, Clause 16 of the Constitution "*reserv[es] to the States respectively * * * the*

Authority of Training the Militia * * * .” This is an unambiguous command in the text of the Constitution which we cannot ignore. The second amendment to the Constitution provides that, “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms is not infringed.” This amendment mandated the states to keep troops as a check on the power of the federal government as a matter of constitutional law. *United States v. Miller*, 307 U.S. at 178; *see also, Should I Stay or Should I Go*, *supra* note 15 at 176, 203. When read together with Clause 16, the second amendment clearly opposes the power of Congress to raise armies at will. The clauses, however, can be readily harmonized if we accept the concept that the power of Congress over the National Guard is supreme only in times of war or a declared national emergency.

IV. The Decided Cases

A. The Supreme Court

The majority reads the *Selective Draft Law Cases*, *supra*, and *Cox v. Wood*, 247 U.S. 3 (1918), to permit, if not to require, its holding. I find no support for the majority's view in these cases.

The Selective Draft Law of May 18, 1917, ch. 15, 40 Stat. 76, was passed shortly after Congress had declared war on Germany. The act unambiguously recites that the country was faced with an “emergency, which demands the raising of troops in addition to those now available.” 40 Stat. at 76.¹⁹

¹⁹ The draft was specified to be in accordance with Section 111 of the National Defense Act of 1916. That section read as follows:

When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, * * * draft into the military service of the United States, to serve therein for the period of the war unless sooner

In the *Selective Draft Law Cases*, the Court concluded:

[T]he possession of authority to enact the statute must be found in the clauses of the Constitution giving Con-

discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct.

The United States, in its brief to the Supreme Court, made it clear that it was discussing the authority of Congress to draft members of the militia in wartime. It stated:

In an able article in 30 Harv. Law Rev., 712, Maj. S. T. Ansell (now Brigadier General and Acting Judge Advocate General) states (p. 715):

Throughout our history the States have recognized the feasibility of parting with their organized militia *when a national crisis has demanded it*. In the Civil War the States parted first with their active militia in raising their quotas for the Federal Army, and the State organizations with their members became, when mustered into the service, United States Volunteers. The same thing prevailed in the confederacy during that period. In the war with Spain the Volunteer Army was raised in the same manner. Of course, in contemplation of law the militia has been taken not as militia, nor as militia organizations, but as individuals owing the Nation allegiance and service. Such a long-continued course of governmental conduct is not without significance.

The Article concludes with the following adequate language (p. 723):

A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or reserve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? *An organized militiaman is no less a citizen and is much better prepared, largely at Federal expense, to make an effectual contribution to the country's cause in time of war.*

Selective Draft Law Cases, Brief for the United States at 59-60 (emphasis added).

gress power "to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces." Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article I, § 8.

245 U.S. at 377 (emphasis added).

The Supreme Court held that the conscription statute passed under the powers to declare war and to raise and support armies, together with all the other military powers available to the federal government, gave the federal government authority to conscript male citizens. Further, it held that this authority was not limited by the states' reserved authority over the militia. The Court's holding was succinctly summarized four months later in another opinion, on a closely related issue. Chief Justice White wrote:

[O]n the face of the opinion delivered [in the *Selective Draft Law Cases*] the constitutional power of Congress to compel military service * * * was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced

from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies, and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental if not irrelevant and subordinate, provision concerning the militia, found in the Constitution.

Cox v. Wood, 247 U.S. at 6 (emphasis added).

Neither of the cases supports the majority's opinion. The Court simply declared that in war the federal government can use *all* its military powers combined to supersede the states' reserved authority over the militia.

The *Selective Draft Law Cases* are also distinguishable because the conscription statute at issue drafted the members of the National Guard (militia) into the army as *citizens*, not as *militiamen*. For this reason, the government argued that the power to draft *citizens* in no way infringed upon the reserved rights of the states over the *militia*, and thus the Court did not have to reach the militia clause arguments. See *Selective Draft Law Cases*, 62 L.Ed. 349, 352 (1918) (summary of oral argument). See also Friedman, *supra* note 2, at 1496 and Comment, *supra* note 2, at 624 & n.157.²⁰

The language in the *Selective Draft Law Cases* concerning the interplay of the army and militia powers begins with the

²⁰ But see *Thoughts on the Conscription Law of the United States*, in *The Military Draft: Selected Readings on the Constitution* 207-18 (M. Andresen ed. 1982) (draft opinion found in the papers of Chief Justice Taney finding that federal conscription law directed toward citizens, as opposed to militiamen, implicated (and in fact violated) the Militia Clauses of the Constitution); Freeman, *The Constitutionality of Peacetime Conscription*, 31 Va. L. Rev. 40 (1944).

Court noting that an improved understanding of the scope of these provisions can be gained by comparing the powers of the federal government before and after the Constitution was ratified. Under the Articles of Confederation, Congress had the right "to call on the states for forces." 245 U.S. at 382. Correspondingly, the states had an inescapable duty to furnish troops when called. This "embraced the complete power of government over the subject." *Id.* The Court analogized this power to the authority to raise armies under the Constitution.

Following immediately on the heels of this description of "the army sphere," however, *the Court explicitly cautioned that this power was not controlling over the states. Rather, its use was confined to those "exigencies" in which Congress, in its discretion, saw fit to use the power.*²¹

The Court stated:

But the duty of exerting the power thus conferred in all its plentitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play.

Id. at 382-83 (emphasis added).

The Court then continued its comparison of the Articles of Confederation to the Constitution. Under the Articles, the Court declared, there was an open area of authority that, in the absence of the proper exercise of the power to raise armies, left the states with control over the militia. This control was, in the Court's view, analogous to the authority reserved to the states under the militia provisions of the Constitution.

²¹ Chief Justice White, four months later, in *Cox*, clarified that his holding in the *Selective Draft Law Cases* was based on the authority of the war and army powers exercised together.

The Court next explained that the Militia Clauses also provided further positive powers to Congress. The Court noted that Clause 15 allowed Congress to make use of the militia when insurrection or invasion was threatened and to execute the laws. Clause 16 also provided Congress with some power over the organization and training of state militias. The Court carefully declared, however, that *the Militia Clause left the specific "carrying out of" (i.e., the specific authority over) the organization and training of the militia to the states. Id.* at 383 (emphasis added).

The Court found that these "fine-tuned" powers given to Congress in the Militia Clauses were created to "diminish" or limit the use of the awesome army power—and its attendant dominance over state authority—to those situations in which the exercise of such vast power was *strictly necessary. Id.* at 383.

In concluding, the Court emphasized the care required in interpreting the conflicting authority of the army and militia provisions of the Constitution. It was true, said the Court, that the Militia Clauses provided Congress other ways, in addition to the Army Clause, to exert power over the militia. These other grants of positive authority, however, did not diminish the strength of the army power which, *once properly exerted—or in the Court's words, exerted "only as in the discretion of Congress it was deemed the public interest required"—was "complete and dominant."* *Id.* at 383-84 (emphasis added).

Following from this, the Court found that the army power, when properly exercised, could "potentially" narrow the power of the Militia Clauses. There was no suggestion, however, that, absent an exigency, the integrity of the Militia Clauses could be compromised. The Court carefully emphasized that the army and militia powers were "distinct and separate,"

that both comprised meaningful areas of authority, and that neither area was to be "weakened or destroyed" by construing the other power too broadly. *Id.* at 384.²²

B. The Lower Federal Courts

The majority cites two cases, *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969), and *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968), in support of its view that the Montgomery Amendment is constitutional as a necessary and proper exercise of Congress' army power. I doubt the validity of this view. *Johnson* and *Drifka* both arose during the Vietnam War where there was a declaration of national exigency.

In *Johnson*, National Guardsmen challenged the constitutionality of Pub. L. No. 89-687, 80 Stat. 981 (1966). This statute, enacted in the midst of the Vietnam War, provided the President with temporary authority, based upon a determination of presidential necessity, to order a member of the National Guard of the United States to active duty for up to 24 months.

The Guardsmen alleged, *inter alia*, that the statute violated Clause 15. Specifically, they asserted that, because the duty did not fall within the powers granted Congress in that clause (i.e., the duty did not involve insurrection, invasion, or the need to execute the laws), the statute was unconstitutional.

²² The Supreme Court has held that other constitutional provisions operate as a limit on Congress in military affairs. See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (army power must be used in manner consistent with the equal protection guarantees of the fifth amendment); *Gillette v. United States*, 401 U.S. 437 (1971) (army power must accommodate the establishment clause of the first amendment); *United States v. O'Brien*, 391 U.S. 367 (1968) (army power must accommodate first amendment free speech). Furthermore, the Supreme Court specifically stated that Congress' power to declare war and to support armies is not plenary, *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919), but is subject to other applicable constitutional limitations.

The Court responded to this claim by stating that Pub. L. No. 89-687 was not enacted under the authority of Clause 15, but rather under the dual enlistment system which was based on the army power and the Necessary and Proper Clause.

Congress, two years prior to the enactment of Pub. L. No. 89-687, had declared the presence of a "national exigency" in the "Gulf of Tonkin Resolution." See Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964). In this resolution, Congress specifically found that the "deliberate and repeated" attacks on United States naval vessels in Southeast Asian waters "created a serious threat to international peace." It further declared that the "United States regards as vital to its national interest * * * the maintenance of international peace and security in southeast Asia." Therefore, the Congress declared its readiness, "[c]onsonant with the Constitution of the United States * * * , as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." *Id.* This statement of exigency, together with the exercise of the congressional powers to raise armies and to make laws under the Necessary and Proper Clause, provides a constitutional basis for Pub. L. No. 89-687.²³

The *Johnson* court indirectly acknowledged that Pub. L. No. 89-687 was motivated by a threat to the national security. The Court stated that the "purpose" of the law was to make National Guard troops available to the federal government when the "national security" was threatened. 414 F.2d at 1063-64.

²³ *Drifka* adopted a rationale similar to that stated in *Johnson*. 294 F. Supp. at 427-28.

V. The National Exigency Requirement

Like the Supreme Court in the *Selective Draft Law Cases*, this Court is now faced with the interplay of two constitutional provisions which have the potential to conflict in their exercise. Both have power and purpose, and thus in harmonizing these provisions, we must attempt to preserve as much of the authority of each as we sensibly can.

If the federal government can make the militia a federal force at will, the militia's intended purpose as a check on federal military power will be frustrated.²⁴ Moreover, the

²⁴ The United States District Court for the District of Massachusetts similarly found that the government's position concerning the power of the Army Clause leads to the "abolition" of the militia by leaving the Militia Clauses of the Constitution without practical application. Specifically, the court stated:

Counsel for the defendants conceded at oral argument that [its] conception of the dual-enlistment system makes the militia dependent on Congress for its existence because, in a practical sense at least, the militia exists only when Congress does not want or need it as a part of the Army. Under such a dual-enlistment concept, pushed to the logical limit, Congress could at any time order the entire militia into active duty year-round, thus abolishing the militia and leaving the Militia Clause without practical application. A plain reading of the Constitution support plaintiffs' contention that Congress cannot "abolish" the militia by transforming it into a part of the Army. See U.S. Const. amend. II ("A well regulated militia being necessary to the security of a free State . . ."); Militia Clause, *supra*, ("reserving to the States respectively . . . the Authority of Training the Militia according to the discipline prescribed by Congress).

Dukakis v. Dept. of Defense, 686 F. Supp. 30, 36 (D. Mass.), *aff'd*, 859 F.2d 1066 (1st Cir.), *cert. denied*, 109 S. Ct. 1743 (1988).

In order to avoid these problems, the court departed from the government's position and distinguished the *Selective Draft Law Cases* from the present controversy concerning the Montgomery Amendment by noting that the Selective Draft Law controversy arose in wartime. Thus, according to the court, it followed that the "present controversy presents the issue of accommodation between the Armies Clause and the Militia Clause in a context less

Framers' intent—particularly in light of the structure of the Militia Clauses—cannot be fairly read to support plenary federal control of the militia, absent a threat to the national security.

The majority declares that, under the Army Clause, the federal government can make the militia a federal force at will. It says that it can do this because the militia has been changed into: (1) the National Guard, and (2) the National Guard of the United States (NGUS). Thus, the majority argues that when the militia is ordered to put on its NGUS hat, it is available to the federal government any time the federal government wants, to do anything the federal government desires.

This cannot be right.

A power that the Constitution explicitly enumerates as a state power—a state power designed to check federal power and to protect the states from the exertion of federal power—cannot through "a mere form of words" be transformed into an unchecked instrumentality of federal power.

Based on these considerations, I conclude, as did the Court in the *Selective Draft Law Cases*, that before the federal

compelling than that of *Selective Draft Law Cases*, for priority of the Armies Clause." *Id.*

While all this appears clear—and consistent with this dissent—the *Dukakis* court concluded: "Nevertheless, guided by the decisions in the dual-enlistment cases as well as that of *Selective Draft Law Cases*," the states' reserved authority in the Militia Clauses "does not override the legitimately exercised power of Congress '[t]o raise and support Armies.'" *Id.* (emphasis added).

The *Dukakis* court acknowledged that if the Militia Clauses are to have any continuing meaning, there must be a line of reserved state authority over which the federal government cannot cross. However, the court neither explained where that line is nor why it believed the Montgomery Amendment falls on the permissible side of that line.

government can exercise its army power to supersede the reserved state authority over the militia, its actions must be motivated by a "national exigency."

Implied in this requirement, to assure its observance, is the necessity of an affirmative declaration. Thus, before the legislative or executive branch can use the authority of the Army Clause to overcome reserved state authority over the National Guard, Congress or the President must first affirmatively assert the existence of a national exigency or of a specific threat to the national security.

The power to determine the existence of such circumstances belongs only to Congress or the President. Once this power is exercised, the substance of the determination cannot be challenged by the states or by individual National Guard members sent into federal service. See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827). Such a challenge would involve a central "political question," see *Baker v. Carr*, 369 U.S. 186, 213, 217 (1962), and would hence not be justiciable.

It might be argued that the necessity of an affirmative declaration is thus meaningless. I believe, however, it is a serious undertaking for the President or for Congress to declare a national emergency. Such a declaration alerts the coordinate branches of government, the states, the citizens of the nation, and the nations of the world that the United States believes its interests are threatened and that it is prepared to take appropriate steps. It may at times be politically distasteful to an incumbent administration or to Congress to declare a national emergency, but ours is an open society and experience teaches that in matters of great import, support of the citizenry is essential.

VI. *From the Militia to the National Guard*

Over the last eighty-five years, the federal government has gradually assumed greater control over the state militias.

Congress has, however, consistently recognized the constitutional limits on its power to call the state National Guards into active service for training or operational missions in peacetime without gubernatorial consent. The Montgomery Amendment represents the first congressional departure from this recognition.

A. The Dick Act of 1903

After the poor performance of state militia in the Spanish-American War, Congress began to use its Clause 16 power to "organize, arm and discipline" the militia, together with federal funds to improve the organization and coordinate the training of state militias. Thus, after 111 years, during which the national militia laws had been relatively unchanged,²⁵ Congress in 1903 passed the "Dick Act." Act of January 21, 1903, ch. 196, 32 Stat. 775. This law renamed the organized militias of the states the "National Guard" and provided federal funds to equip and to train them with regular army officers. This aid was conditional, however, on compliance with federal standards for training and organization.

The Dick Act carefully observed basic state authority over the National Guard. In this light, the War Department could not issue additional arms or assign regular army officers to state National Guard units until the state governor explicitly requested such assistance. 32 Stat. at 777. Similarly, National Guard units could not engage in joint encampments, maneuvers or field instruction with regular troops during summer training unless the governor made a formal request for such training. 32 Stat. at 777-78.

²⁵ The Uniform Militia Act of 1792, ch. 33, 1 Stat. 271, remained the primary law regulating the militia until 1903. For congressional activity between 1792 and 1903, see *Should I Stay or Should I Go*, *supra* note 15 at 179-185.

B. The National Defense Act of 1916

The National Defense Act of 1916, ch. 134, 39 Stat. 166 (the 1916 Act), continued the use of federal funds as an inducement to further federal "organizational" control over state National Guards. The 1916 Act also recognized the constitutional limits on federal control over state National Guard forces by providing that "nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace * * * ." 39 Stat. at 198 (codified at 32 U.S.C. § 109(b)). It also declared that sentences of dismissal or dishonorable discharge from the National Guard must be approved by the governors of the respective states. 39 Stat. at 209.

C. The National Defense Act Amendments of 1933

At the outset of World War I, it was believed that the Militia Clauses might prevent National Guard units from being called into federal service outside of the categories listed in Clause 15. Thus, volunteer units with high morale, which had trained together and were in a relatively high state of readiness, were disbanded when the war began. The government then drafted the individual members of these units into the Army, where they were reassigned to new units. This process not only hurt National Guard morale but was viewed as bad federal defense policy, given that trained units are generally in short supply at the beginning of crisis periods.

The 1933 amendments were primarily designed to remedy this problem by allowing the federal government to mobilize National Guard units intact "so as to eliminate the delay incident to draft." S. Rep. No. 135, 73rd Cong., 1st Sess. 2 (1933); see also H.R. Rep. No. 141, 73rd Cong., 1st Sess. 2 (1933). To accomplish this objective, Congress created the

"dual enlistment" concept. Dual enlistment required the members of state National Guards to be concurrent members in a new entity called the National Guard of the United States (NGUS). The NGUS was a reserve component of the United States Army created under the authority of the Army Clause.

Based on this dual status, the 1933 amendments gave the President power to order the National Guard in its army status as the NGUS into federal service, *but only in the event of a "national emergency" declared by Congress*. In this light, the accompanying Senate report states that the "control, officering, and discipline [of the National Guard] except when ordered out pursuant to an emergency declared by Congress, [is left] with the respective States, just as at present. The relation of the Guard to the respective states during peace is in nowise affected or altered." S. Rep. No. 135 at 2. According to the House report, the 1933 amendments "reserv[ed] to the States their right to control the National Guard or the Organized Militia *absolutely* under the militia clause of the Constitution in time of peace." H.R. Rep. No. 141 at 5 (emphasis added).

Thus, contrary to the majority's view, the 1933 amendments did not change the degree of federal control over the National Guard but merely codified the existence of preeminent federal power in a national emergency or exigency. Acknowledging the limited change in federal control over the Guard affected by the 1933 changes, one federal district court has declared that the "National Guard, while something of a hybrid under both state and federal control, is basically a state organization." *Mela v. Callaway*, 378 F. Supp. 25, 28 (S.D.N.Y. 1974); see also *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46, *vacated on other grounds*, 382 U.S. 159 (1965) ("The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution.").

The 1933 amendments recognized that federal authority over the National Guard in a national emergency is pre-eminent. In such a narrow circumstance, state authority is superseded, and thus there are no state limitations to avoid. The dual enlistment system was not a clever ploy by Congress to avoid at will the state powers embodied in the Militia Clauses. Rather, it was simply the statutory recognition of the constitutional principle that federal authority was supreme over the National Guard in national emergencies.

D. The Armed Forces Reserve Act of 1952

The declared purpose of the Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 (the 1952 Act), was to bring together in one statute the laws relating to the reserve components of the various branches of the armed forces. See *Should I Stay or Should I Go*, *supra* note 15, at 193. Section 233 of the 1952 Act for the first time relied on the Army Clause powers of the Constitution to bring national guardsmen into federal service for training. The 1952 Act, however, specifically required that the federal authority requesting National Guard participation first obtain the consent of the relevant state governor.

Relevant to the present case are two provisions of the 1952 Act, now codified at 10 U.S.C. § 672(b) and (d). These subsections provide the federal government with authority to call state guardsmen to active duty with *the consent of their state governors*. Federal training of state National Guard troops is done under the authority of these provisions. The provisions state:

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member assigned to a unit organized to serve as a unit, in an active status in

a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. *However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State * * * .*

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. *However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State * * * .*

10 U.S.C. §672 (emphasis added).

If the gubernatorial consent requirement in these statutes were to be eliminated, the federal government would have plenary power to put the National Guard under its control at any time and for any purpose. Such a state of affairs would clearly frustrate the reserved state authority over the militia contemplated by the Constitution, particularly by the Militia Training Clause.

In this light, the United States Military Court of Appeals has found that the gubernatorial consent requirement of 10 U.S.C. § 672(d) "has constitutional underpinnings in Art. I, § 8 of the Constitution of the United States." *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977) (footnote omitted); accord *United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1982); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978). Moreover, although we owe no special deference to congressional judgments regarding constitutional questions, the available

evidence indicates that Congress included the gubernatorial consent requirements in these provisions specifically to avoid potential conflict with reserved state authority.²⁶

²⁶ Draft versions of the legislation that would become the 1952 Act provided that National Guard units could be ordered to active duty outside of the situations enumerated in Clause 15 or the declaration of a national emergency without first obtaining the consent of the relevant state governors. In response, witnesses who believed that such federal power violated the Militia Clauses filed "voluminous comments" with the Senate Armed Services Committee. See *Reserve Components: Hearings on H.R. 4560 Before the Committee on Armed Services*, 82d Cong., 1st Sess. 473 (1951).

Specifically, General Ellard A. Walsh, a distinguished Minnesotan and spokesman for the National Guard Association, declared that a proposed bill without the gubernatorial consent requirement:

concentrat[ed] too much power in the Executive and too much authority in the Department of Defense, and would in a number of instances infringe not only on the authority of the sovereign states but of the Congress as well.

Id. at 483.

Walsh maintained the bill without the gubernatorial consent provisions:

very definitely violates the provisions contained in the militia clauses of the Federal Constitution, and notably article I, section 8, clause 16 thereof, which reserves to the states the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

Id. at 476, 482.

Such an arrangement, Walsh argued, would disrupt the basic constitutional principle that the Guard must be "responsive to the orders of the governor." *Id.* at 478.

Congress was also flooded with letters from state National Guard officials who pointed to the Militia Clause requirement for divided federal-state authority. Ernest Vandiver, Adjutant General for the State of Georgia, complained that the proposed bill "will delegate to the Pentagon the constitutional rights and powers imposed in the governors of the respective States to command their militia." *Armed Forces Reserve Act: Hearings on H.R. 5426 Before the Senate Subcommittee on Armed Services*, 82d Cong., 2d Sess. 312 (1952). The Adjutant General of Illinois, Leo M.

E. The Montgomery Amendment of 1986.

In 1986, the Governor of Maine refused to allow 48 members of the Maine National Guard to participate in a training mission in Honduras. After several other governors threatened to follow suit, a Senate subcommittee began to explore the question of whether the gubernatorial consent provisions of the 1952 Act should be abolished. See *Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower & Personnel of the Senate Committee on Armed Services*, 99th Cong., 2d Sess. (1986) (stenographic transcript) (1986 Senate Hearings). The hearings were held with short notice, and many who wished to testify against the proposal were unable to do so. 1986 Senate Hearings, *supra*, at 8. Among the governors objecting to this legislation were Gov. John H. Sununu, now President Bush's Chief of Staff, Gov. Thomas H. Kean (New Jersey), Gov. Mark White (Texas), Gov. Harry Hughes (Maryland), Gov. Victor Atiyeh (Oregon), Gov. James R. Thompson (Illinois), Gov. George Nigh (Oklahoma), Gov. Bill Allain (Mississippi), Gov. Norman H. Bangerter (Utah), Gov. Ed. Herschler (Wyoming), Gov. Richard D. Lamm (Colorado), Gov. Mario Cuomo (New

Boyle, enclosed his prepared remarks protesting a prior proposal to "federalize" the National Guard. "I support the wisdom and farsightedness of our forefathers and the framers of the Constitution when they wrote the militia clause of the Constitution," Boyle wrote. "The National Guard system comprising as it does—citizen soldiers—has always been a bulwark against the concentration of military power in our Federal Government." *Id.* at 310.

Thus, it appears that to counter the perceived "federalization" of the Guard, the National Guard Association proposed, among other things, an amendment requiring the consent of the governor of the State concerned before National Guard units could be called to active duty outside of national emergencies or the contingencies noted in Clause 15. Congress listened and enacted the gubernatorial consent provisions, 10 U.S.C. § 672(b) and (d).

York), Gov. William A. O'Neill (Connecticut), Gov. Gerald L. Baliles (Virginia), Gov. Madeline M. Kunin (Vermont), Gov. Bruce Babbitt (Arizona), Gov. John Carlin (Kansas), Gov. William J. Janklow (South Dakota), Gov. George A. Sinner (North Dakota), Gov. Arch A. Moore, Jr. (West Virginia), Gov. James J. Blanchard (Michigan), and Gov. Juan Luis (Virgin Islands).

Former Gov. Sununu stated:

I want to go on record as opposed to * * * any legislative attempt to remove the authority or control of the National Guard from the states. This legislative initiative is directly contrary to the language and intent of the U.S. Constitution.

The National Guard, for over 200 years, has responded wherever and whenever our nation called. With gubernatorial control of the National Guard in peacetime, the nation has always had full confidence in the availability of this reserve force for war or national emergency. There is no evidence * * * that there is any less commitment to that responsibility today. The President will always have the prerogative, by federal statute, to call the National Guard in time of war or national emergency.

Comments of Governor John H. Sununu, entered into record of *Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services*, 99th Cong., 2d Sess. (July 15, 1986).

The Department of Defense had counseled caution and hoped the crisis would fade over time.⁸⁷ In the end, the subcommittee took no action.

⁸⁷ See Kester, *State Governors and the Federal National Guard* 11 Harv. J. L. & Pub. Policy 177, 179 (1988).

One month later, Rep. G.V. "Sonny" Montgomery of Mississippi submitted an amendment to the proposed Defense Authorization Act of 1987 that provided that a governor could not withhold his consent with regard to active duty outside the United States because of objections to the location, purpose or scheduling of the mission. See Cong. Rec. H6267 (daily ed. Aug. 14, 1986). Because the proposal took the form of an amendment to the defense bill, debate on it in the House of Representatives was limited to a total of ten minutes. Moreover, there were no hearings on the amendment before it reached the floor for a vote. In response, many representatives noted the fundamental impropriety in making such a great potential change in defense policy—if not in the constitutional balance of power—without the benefit of hearings, *id.* at H6262-68 (remarks of Reps. Edwards and Schroeder), and with such limited debate.⁸⁸ The consideration of the bill was further overshadowed by ominous recurring warnings to the representatives that if they did not act quickly to eliminate the gubernatorial consent requirement, the fed-

⁸⁸ With regard to the limited debate concerning the Montgomery Amendment, Rep. Dyson stated:

Mr. Chairman, the Guard has no greater friend than the Gentleman from Mississippi [Mr. Montgomery], but I think this is a bad idea. We have not had enough time to look into this; 10 minutes per amendment is not enough time to fully understand a proposal as important and as far reaching as this amendment.

Cong. Rec. H6266 (daily ed. Aug. 14, 1986).

Rep. Schroeder stated:

Basically, whether you agree or disagree, I think we all agree that if [the Montgomery Amendment] is unconstitutional according to many constitutional scholars, and if we have never had hearings, and if it has been functioning this way for over 200 years, why in the world the rush to put this in with a 10-minute debate on the House floor?

I think that is playing too fast and loose.

Id. at H6267.

eral government would eliminate funding to their state National Guards.⁸⁸

In the end, calls for deliberation and caution did not prevail, and the full House, after 10 minutes of debate, approved the Montgomery Amendment 261-159. At conference, the Senate defense bill did not contain the proposed amendment. The conferees, however, made one technical change in the House version and included a notation on legislative intent that allowed the governors to withhold consent if they needed the Guard for local emergencies.⁸⁹

⁸⁸ For example, Rep. Montgomery warned the members of the House:

If we do not adopt this amendment, and as I have said earlier, the National Guard is dead in the water; you can forget about it. You Governors are going to lose all your equipment; you are going to lose a lot of payroll, so you had better support this amendment and let the Guard keep going.

Cong. Rec., *supra* note 28, at H6267.

Moreover, on July 15, 1986, James H. Webb, Jr. told a Senate Armed Services Subcommittee that an alternative to retaining the gubernatorial consent requirement was "to give the fullest resourcing . . . to those units that are able to participate in 'real world' training missions . . ." Prepared statement of Assistant Secretary of Defense for Reserve Affairs, *see* 1986 Senate Hearings, *supra*, at 5-14. Ten days later, on July 25, 1986, the House Committee on Armed Services strongly urged the chief of the National Guard Bureau to consider withholding funds from states that refused to participate in overseas training assignments. H.R. Rep. No. 718, 99th Cong., 2d Sess. 176 (1986).

⁸⁹ Specifically, the conference report stated:

The conferees reiterate that under this provision, the governor still will have the authority to block the training if he or she thinks the guardsmen are needed at home for local emergencies. The conferees intend that nothing about the words "location, purpose, type, and schedule" should constrain a governor in according appropriate priority to a state or local emergency, such as a flood or other natural disaster.

Legislative History of Pub. L. No. 99-661, 99th Cong., 2d Sess. 475 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 6413, 6534.

The effect of this amendment is to give the Defense Department unfettered authority over the state National Guard units. It permits the Department to call out the individual National Guard units for training or operational missions in peacetime and to do so in the face of objections on the part of the governor of the affected state. I believe that the Montgomery Amendment contravenes the intent of the Framers. It allows the federal government to make state National Guards part of a federal force in peacetime at will. It eliminates all check on federal military power by the states and frustrates state authority to resist operational and training missions of the National Guard when there is no threat to the national security and when no emergency has been declared. From time to time over the past 200 years, the Congress of the United States has taken steps to improve the effectiveness of the National Guard. Until 1986, however, it always recognized the restraint of the Militia Clauses of the United States Constitution.

Not only is the Montgomery Amendment contrary to the intent of the Framers, but it ignores the plain words of the Constitution, the decisions of the United States Supreme Court, and the decisions of the lower courts. Until *Dukakis* and *Perpich* were decided by the federal district courts, no federal court had held that Congress had the power under the Constitution to authorize the Defense Department to call out the National Guard in peacetime absent the declaration of an emergency. Every other case has involved a situation in which the Guard was called out in wartime or at a time when a national emergency had been declared.

VII. Policy Arguments

The government argues that the Framers could not have foreseen the degree of dependence that the United States has

placed on National Guard troops. If they had, the argument goes on, they would never have intended the states to possess the veto power given them in the 1952 Act. Thus, the government asserts that the gubernatorial consent requirement allows the states to participate in defense and foreign policy decisions in ways the Framers never would have sanctioned.

In response, the Framers made a conscious decision to place the bulk of the nation's defensive forces in the hands of state troops. Through much of American history, a large percentage of the nation's defensive forces have been organized in the form of militia or state National Guards. *See supra* note 3. Until 1986, state authority over these forces had been almost entirely unchanged by Congress. While it is true that the Framers did not want the states to make positive national defense or foreign policy, they did intend the states to be a check on potential abuse of military power by the federal government. In this light, the gubernatorial veto requirement of the 1952 Act is a particularly apt legislative adaptation of a constitutional concept.

The government argues that the Montgomery Amendment is necessary to ensure an effective national defense. However, it provides *no* evidence that the effectiveness of the national defense or of the National Guard will be diminished by an adherence to the constitutional principle of basic state control over the National Guard forces, absent a declaration of war or of national exigency.

In the last fifteen years, the National Guard has become a major part of the defensive force of the United States. After the Vietnam War and the presidential action discontinuing selective service registration, Congress decided to decrease the size of the standing military and to place increased reliance on reserve components, particularly on the National

Guard. In this "Total Force" concept, the reserve components became major participants in the national defense effort.

The government maintains that the modern world has grown far more complex and dangerous than it was in 1787. The armed forces of the United States must today be able to respond rapidly to a broader range of potential threats to the national security than the Framers could have ever envisioned. Thus, the government argues, state-based limitations on federal control embodied in the Militia Clauses applied to a different time and different circumstances. The necessities of the modern world require this Court to act "pragmatically" and to read these anachronistic reserved powers either very narrowly or out of existence entirely.

The figures that the majority cites show that the National Guard is a major part of the defensive force of the United States. However, if the national security is in any way threatened, the federal government can quickly assume total control over the National Guard by declaring a national exigency. Thus, in any situation demanding quick action, there would be no state-controlled obstacles to hinder the government's response.

The government's second pragmatic argument follows closely from the first. Secretary Webb, in his Senate testimony, explains that, because of the nation's great dependence on the National Guard, these forces must be extremely well trained. This is necessary both so that they are prepared for all future emergencies and so that, at the appropriate time, they can mesh their operation with the regular army and other reserve components. *See* 1986 Senate Hearings, *supra*, at 56-6-8. Specifically, Secretary Webb asserts that the National Guard units must train in foreign environments with their unusual climates and terrain, alongside their full-time army and air

force counterparts, in order to achieve "operational readiness." Any interference by obstinate state governors in this training process is likely to be disastrous in terms of the Guard's ability to operate effectively in a future crisis.

In response, all of the parties to this case agree that broad training experience for the National Guard is essential to the adequate defense of the United States. Indeed, even in the midst of the Honduran training controversy in 1986, Lieutenant General E. H. Walker, Chief of the National Guard Bureau,⁸¹ stated:

[N]o governor has said he opposes overseas deployment training—all have said they wholeheartedly believe in it and understand and support the need for it.

1986 Senate Hearings, *supra*, at 95-5.

Since the Guard began training overseas in the early 1970's, no governor has ever withheld his or her consent to a training mission or any type of mission—until the National Guard began to train in Honduras. Moreover, states have never opposed training on the basis of terrain or climate. They have never opposed Guard exercises coordinated with regular forces. In short, they have never opposed the substance or content of training—nor are they likely to do so in the future. The states have only opposed an order for training when the real purpose of the order is something more than training.

⁸¹ 10 U.S.C. § 3040 provides:

(a) There is a National Guard Bureau, which is a Joint Bureau of the Department of the Army and the Department of the Air Force, headed by a chief who is an adviser to the Army Chief of Staff and the Air Force Chief of Staff on National Guard matters. The National Guard Bureau is the channel of communications between the departments concerned and the several States, Territories, Puerto Rico, the Canal Zone and the District of Columbia on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States.

In the case of the Honduran controversy, the state objections all concerned the potentially dangerous implications that training in a politically explosive part of the world might have.⁸²

In this light, the substance of the government's training argument is better understood. The government does not argue that gubernatorial consent prevents it from exposing Guardsmen to a proper diversity of climate or terrain or that it prevents Guardsmen from training alongside their full-time army and air force counterparts. This could be easily done in non-controversial areas of the world, as it has in the past. The real essence of the government's argument must then be that the National Guard must train in areas of extreme political tension if it is to be an effective fighting force.⁸³ This

⁸² As Senator Glenn stated at the hearings:

I know back in my own state of Ohio this question came up, why Honduras and why now? I think we ought to face that. That is the reason we are up against this thing now. Normally, we train in Panama—we have done that for a decade and a half or so—to give them jungle training.

The issue we have to address here and we have only touched on it peripherally is why Honduras? I think the concept, the view of many of the governors, is that we are looking for [political] support for a policy that all Americans do not agree with by sending people to Honduras.

I am being blunt about that, but that is the fact. That has been editorialized across the country. That is the issue here really. Does the training have to be in Honduras?

When they were being ordered down to Honduras, it was the very time there were border crossings, with reports of several hundred people being killed. The governor had the National Guard there when the perception was that we are sending our people into the combat zone. That was the public perception.

1986 Senate Hearings, *supra*, at 23.

⁸³ General La Vern E. Weber (Retired), former Chief of the National Guard Bureau, discussed the government's position in his testimony to the Senate Subcommittee:

I submit to you that such deployments are highly desirable, but not absolutely necessary to achieve combat readiness levels.

National Guard units can be trained to Federal standards of

could be the case, but the government has presented no evidence to support this argument.

Moreover, if the Honduran training controversy is a prototype of the dangers this country faces in the absence of the Montgomery Amendment, the following is of some interest. General La Vern E. Weber (Retired), former Chief of the National Guard Bureau, noted that the Honduran controversy had little effect on overall Guard training operations and suggested that any difficulties stemming from such a controversy in the future could easily be remedied through existing regulations and the withholding of federal funds from non-cooperative states. He stated:

Based on my discussions with key leaders of the Guard, it is my opinion that recent public comments and actions

professionalism right here in the United States, in the schools and maneuver areas Congress has provided for that purpose.

Deployment to areas outside the CCNUS [Continental United States] is highly desirable as adventure training, to enhance morale and give the troops a broad experience, but I submit to you that in a training sense, driving a bulldozer in Fort McCoy, Wisconsin, is very similar to driving a bulldozer in Honduras.

1986 Senate Hearings, *supra*, at 100-01.

General Weber also stated:

The narrow issue here is whether or not Congress believes that Federal training standards must include duty in Honduras, regardless of the arena of operation to which units are intended to be deployed in some future conflict. If the Congress believes that, then all Army and Air units, Regular Guard and Reserve must be sent to Honduras.

Id. at 100.

General Weber concluded:

Any legislative action at this time would not serve to improve Guard readiness or availability in the event of emergency or war. If the Congress is concerned that the Chief of the National Guard Bureau cannot employ current directives to ensure proper training of the Guard forces, they can, and should, direct that he report periodically on any instances of refusal to train which are likely to adversely impact on readiness.

Id. at 102.

by state authorities have not impaired the nation's ability to rely on the National Guard nor have they adversely impacted the units' readiness.

I strongly agree and believe the recent actions are only an irritant which can be dealt with through existing statutes and regulations. The Chief of the National Guard Bureau has the authority to manage Federal funds appropriated for Guard training and can direct action as Chief of the agency serving as the line of authority between the Army and Air Force and the states.

1986 Senate Hearings, *supra*, at 99.³⁴

One last *pragmatic* consideration. It is important to realize that National Guard forces were involved in the recent invasion of Grenada and the bombing of Libya. In both of these instances, the Guard was activated under 10 U.S.C. § 672, for "training", rather than under the operations provisions, 10 U.S.C. §§ 673, 673a, 673b, which require a declaration of

³⁴ General Walker described in careful detail the "crisis" in National Guard training operations that led to the Montgomery Amendment:

In 1986 [the year the Montgomery Amendment was enacted] more than 42,000 members of the Army and Air National guards trained overseas in 46 countries. More than 9,000 Army and Air Guard personnel from 43 states and territories trained in Central America alone.

* * * *

The few governors that have precipitated [the Montgomery Amendment] have stopped a total of 48 people from training in one country—Honduras—not the other 45 countries. *Those 48 people constitute .0001 percent of the total deploying force—less people than report to sick call on an average base on a given day, less people than have had to forego scheduled training for employer support reasons and less people than have had to forego participation due to other commitments. Clearly 48 people in comparison to the total deploying forces or the entire Guard strength is insignificant in terms of impact.*

1986 Senate Hearings, *supra*, at 94-35 (emphasis added).

emergency or consultation with Congress. See Testimony of Secretary Webb, 1986 Senate Hearings, *supra*, at 83;³⁵ Com-

³⁵ The following exchange concerning the recent bombing of Libya by American forces comes from the 1986 Senate Hearings:

Senator Levin: Would [the Libyan raid] be treated as a training mission?

Mr. Webb: That was under 672(d) which is for training.

Senator Levin: So, that use of National Guard troops in Libya was considered a training mission by the DoD?

Senator Warner: Under the law.

Senator Levin: Is that the way DoD considered it, training?

Mr. Webb: Under the law.

What you have is the compression of missions once the Total Force Doctrine came into effect so that you have National Guard units all over the world on any given day under the rubric of 672, which is a problem because you have to go all the way from 672 to a Presidential 100-K call-up with very little in between.

I understand where you are going and it is a problem. We have a difficult time defining what is an operational mission with the compression of these missions under the Total Force Doctrine.

Senator Levin: I wondered whether DoD considered that a training mission in Libya? That is my question.

Mr. Webb: I do not have authority to speak on how Secretary Weinberger would have termed that.

Senator Levin: Could you answer that also for the record? Could you check with the Secretary's office and let us know that, too?

1986 Senate Hearings, *supra*, at 82-83.

Secretary Webb later sent the subcommittee the following written response to Senator Levin's question:

The Air National Guard aircraft utilized in support of the Libyan raid was already in Europe as part of routine tanker task force activities. Under long standing practice, Guard and Reserve air refueling aircraft supplement active force refueling aircraft assigned to a tanker task force stationed in Europe. The tanker task force provides day-to-day refueling training opportunities to Guard and Reserve crews, and is also available to the theater commander to meet any operational requirement that may arise. The Libyan raid was just such an operational requirement. The Guard aircraft was not sent to Europe for

ment, *supra* note 2, at 636. Some commentators have suggested that this use of these active duty provisions for "training" was "surreptitious" and designed to elude the statutory requirements for operational missions. See Comment, *supra* note 2, at 636. Whatever the case, prior to the Montgomery Amendment, the governors, as the representatives of their states, provided at least some check on the potential abuse of these provisions. Without the governors, there would be no check at all.

VIII. Conclusion

The world has changed since 1787. It is smaller than it once was. Today's military forces need to be able to respond promptly. Yet, the world has not changed so dramatically that we can no longer abide by the explicit provisions of our Constitution. Congress simply cannot take away state control over the militia by calling the militia by a different name, NGUS, and by giving it concurrent federal duties.

Federalism is not yet meaningless. It remains a vital element in our constitutional system, both as a check on the unwise use of central power and a bulwark of the freedom that derives from local autonomy. In this light, it is undeniable that fundamental powers given to the states explicitly in the Constitution—whether these powers concern civil rights, property rights or state militias—cannot in the absence of the formal amendment process be rendered a legal nullity by the sheer force of a political expediency.

The requirement that the President or the Congress declare the existence of a national exigency—particularly when that

the specific purpose of participating in the Libyan raid. Under section 672(d) the crews can be on active duty, including active duty for training. The crew of this Guard aircraft was on active duty.

Id. at 83 (attachment).

statement is not subject to challenge—is a small concession indeed to the doctrine of separation of authority which underlies our constitutional system.

When the nation did not face a specific internal or external threat, the Framers wished part of the nation's military power to be under the control of the states to check the possibility of abuse of military power by the federal government. In this vein, the Constitution of the United States "reserv[es] to the States respectively * * * the Authority of training the Militia * * * ." When the words and the intent come together in such a manner, our duty is clear. We must uphold the Constitution.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 87-5345

RUDY PERPICH, etc., et al.,

Appellants,

vs.

UNITED STATES DEPARTMENT OF DEFENSE,
et al.,

Appellees.

AMENDED ORDER

Appeal from the United States District Court for the
District of Minnesota

Appellee's petition for rehearing en banc has been considered by the Court and is granted. The Court's opinion and judgment of December 6, 1988 is hereby vacated.

January 11, 1989

Order Entered at the Direction of the Court:

ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals,
Eighth Circuit.

**PETITION
FOR WRIT OF
CERTIORARI**

89-542
No. —

Supreme Court, U.S.

FILED

SEP 26 1989

JOSEPH F. SPANIOL, JR.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

RUDY PERPICH, as Governor of the State of Minnesota,
and THE STATE OF MINNESOTA, by its Attorney
General Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE,
et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT
(PART II)

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UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 87-5345

Rudy Perpich, Governor of the State of Minnesota;
State of Minnesota, by its Attorney General
Hubert H. Humphrey, III,

Appellants,

Commonwealth of Massachusetts, et al.

Amicus Curiae

v.

United States Department of Defense, United States
Department of Air Force, United States Department of
Army, National Guard Bureau, Frank Carlucci, Secretary
of Defense; John O. Marsh, Jr., Secretary of the Army;
Edward C. Aldridge, Secretary of the Air Force;
Lt. Gen. Herbert R. Temple, Jr., National Guard Bureau,

Appellees.

U.S. National Guard Assn.,

Amicus Curiae

Firearms Civil Rights Legal Defense Fund,

Amicus Curiae

Appeal from the United States District Court for the
District of Minnesota.

Submitted: February 9, 1988

Filed: December 6, 1988

Before HEANEY, Circuit Judge, FAIRCHILD,* Senior
Circuit Judge, and MAGILL, Circuit Judge.

HEANEY, Circuit Judge.

I. Introduction

Prior to 1986, state National Guard units could not be sent on federal training missions without the consent of their state governors. See 10 U.S.C. § 672(b) and (d). The Montgomery Amendment, Pub. L. No. 99-661, § 522, 100 Stat. 3816, 3871 (codified at 10 U.S.C. § 672(f) (1986)), prohibits governors from refusing permission on the basis of the "location, purpose, type, or schedule" of the training mission. It thus effectively eliminates the prior consent requirement.

The Constitution of the United States provides that Congress shall have the power:

To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, *reserving to the States respectively * * * the Authority of training the Militia* according to the discipline prescribed by Congress.

U.S. Const. art. I, § 8, cl. 16 (Clause 16) (emphasis added).

Members of the Minnesota National Guard are concurrent members of the Army National Guard of the United States or the Air National Guard of the United States, which

* The HONORABLE THOMAS E. FAIRCHILD, United States Senior Circuit Judge for the Seventh Circuit, sitting by designation.

are reserve components of the United States Army and the United States Air Force. In 1986, the United States Department of Defense ordered members of the Minnesota National Guard to active duty for training missions in Central America pursuant to 10 U.S.C. § 672(b) and (d).

Governor Rudy Perpich of Minnesota claims that, but for the Montgomery Amendment, he would not have consented to one of these training missions. Further, he expects that the Department of Defense will order Minnesota National Guard troops to active duty for training purposes outside of the United States in the future. Perpich claims that the Montgomery Amendment, by effectively withdrawing the gubernatorial consent requirement of 10 U.S.C. § 672(b) and (d), violates the militia training clause of the United States Constitution.

In response, the government argues that the Montgomery Amendment is a proper exercise of congressional authority derived from its powers to raise and support armies together with the necessary and proper clause. Specifically, it contends that these two powers, exercised together, can supersede the states' reserved authority over the militia at will. In addition, the government asserts that the gubernatorial consent requirement allows the states to participate in national defense and foreign policy decisions in ways the Constitution does not permit. Finally, because of the importance of the National Guard to the national defense, the government argues that pragmatic considerations require this Court to read anachronistic state powers embodied in the militia clauses very narrowly.

The district court granted the government's motion for summary judgment, in essence agreeing with the government's first argument. *Perpich v. United States Dep't of Defense*,

666 F. Supp. 1319 (D. Minn. 1987); *see also* *Dukakis v. United States Dep't of Defense*, 686 F. Supp. 30 (D. Mass. 1988), *aff'd*, No. 88-1510 (1st Cir. Oct. 25, 1988) (per curiam) (Dukakis).

We reverse and hold that the Montgomery Amendment, which deprives the states of the "Authority of training the Militia," violates the Constitution of the United States.

First, the Montgomery Amendment contravenes the intent of the Framers. The Framers designed the militia (or National Guard) to serve as a check on the potential abuse of military power by the federal government. Specifically, they intended the states to exercise control over the militia (or National Guard) when the national security was not threatened. In these circumstances, the states were to have authority to withhold support from military projects of the federal government they did not support. Next, the Framers created the second amendment to guarantee the perpetual existence of state-controlled militia (or National Guard) as a check on the abuse of military power by the federal government. *See* U.S. Const. amend. II. Further, if the Framers intended the army power to supersede state control over the militia (or National Guard), it was only in circumstances in which the national security was threatened. Finally, the Framers believed that powers, such as the reserved state authority over the militia, were enumerated in the Constitution to be insulated from irresponsible, short-term political reaction. The Montgomery Amendment frustrates all of these purposes.

Second, the Montgomery Amendment violates the plain language of the Constitution. To further the intentions listed above, the Constitution "reserv[es] to the States respectively * * * the Authority of Training the Militia * * *."

Third, the Montgomery Amendment is at odds with the declarations of the Supreme Court. The Court has stated

that the army power supersedes the militia power only if the government declares war or alternatively determines the existence of a national exigency.

Fourth, the Montgomery Amendment violates constitutional requirements by attempting to supersede reserved state authority over the militia (or National Guard) without an affirmative declaration of a national emergency or exigency.

Fifth, prior to 1986, congressional legislation concerning the National Guard had done nothing to change its state-controlled character when the national security is not threatened. The Montgomery Amendment thus departs from an unbroken pattern of congressional deference to reserved state authority over the militia (or National Guard), embodied in the militia clauses.

Sixth, gubernatorial veto power over federal requests for National Guard troops, when the national security is not threatened, does not impermissibly involve the states in defense or foreign policy decisions.

Finally, the government has not demonstrated that the effectiveness of either the national defense or the National Guard will be diminished by adherence to the constitutional principle of basic state control over National Guard forces, absent a declaration of war or national exigency.

II. *The Intent of the Framers*

A. *The Militia Clauses*

As with many other powers defined in the Constitution, the military power of the United States was based on a system of checks and balances. The Framers divided authority over the military, not only between the coordinate branches of the federal government, but also to a significant degree between the federal and state governments.

The division of power between the federal government and the states is emphasized in several ways. First, because of

the Framers' fear that a large standing army would lead to military abuses by the federal government, state militias were intended to comprise the bulk of the nation's defensive force. Second, control over these militias was explicitly shared between the federal government and the states. (In this light, the states were to appoint the militia's officers and to control the actual training of militiamen.) Third, while the Framers did not want the states to make positive national policy in the areas of defense or foreign relations matters,¹ they did intend the states to use their control over the militia to prevent the federal government, except in circumstances where they believed the national security was threatened, from using state troops in military undertakings objectionable to the states and their citizenry.

Under the Articles of Confederation, the states were required to "keep up a well regulated and disciplined militia * * * ." U.S. Arts. of Confed. art. VI. The central government had power to declare war and the supervisory authority to order the states to produce quotas of armed and trained troops. *Id.*, art. IX. This system proved unworkable. The states had too much independent power to resist the requests of the central government. The troops provided were often inadequately trained and equipped and thus difficult to coordinate into a cohesive defensive force.

Thus, as the delegates assembled during the summer of 1787 to draft a more viable instrument of government, one of the most pressing objectives was the creation of a stronger, more reliable defensive force. This broad aim was widely

¹ The Constitution provides that "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; * * * keep Troops, or Ships of War in time of peace, enter into any Agreement or Compact with another State, or with a Foreign Power, or engage in War * * * ." U.S. Const. art. I, § 10, cls. 1, 3.

shared; however, the effort to find a specific solution proved extremely divisive. From the outset, it was agreed that the problem would not be solved by the creation of a large, federally controlled standing army. The Framers identified such a force with British tyranny, potential oppression of both the states and individual citizens, and expensive, unpopular military adventures.² Thus, while the Framers would ultimately provide for a standing army, they limited its power by declaring that military appropriations had to be approved every two years. U.S. Const. art. I, § 8, cl. 12. More importantly, the Framers intended state militias to provide for the nation's basic defense, with reliance on a standing army only as a last resort.³

² See Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493, 1507-1541 (1969). Indeed, as delegate Edmund Randolph noted at the Virginia ratifying convention, "there was not a member of the federal convention who did not feel indignation" at the idea of a standing army. 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401 (1901) (Elliot). See also Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 924 (1988) (Hirsch); Comment, *The Constitution and the Training of National Guard Officers: Can State Governors Prevent Uncle Sam From Sending the Guard to Central America?*, 4 J. L. & Pol. 597, 600, 601 (1988) (authored by P. Fish) (Comment).

³ As the Supreme Court noted in *United States v. Miller*, 307 U.S. 171, 179 (1939), "The sentiment of the time [of the ratification of the Constitution] strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through the Militia—civilians primarily, soldiers on occasion." See also Hirsch, *supra* note 2, at 924. Apparently, this view was a longstanding one, for Hirsch notes that militia "did the bulk of the fighting, often with success, in the War of 1812, the Mexican-American War, the Civil War (for both the Confederacy and the Union), and the Spanish-American War." *Id.* at 943. Hirsch points out that for the duration of the nineteenth century, "the militia remained the primary military force of the country." *Id.* at 944. "By 1898," he notes, "the regular army had 18,000 troops, compared to 115,000 militiamen." *Id.*

As a corollary to the decision to rely largely on the militia for the nation's defense, it was necessary to provide increased federal control over these forces in order to achieve the goal of improving the nation's military effectiveness. The Convention rapidly agreed that the state militias would be placed under the control of the federal government in emergency situations, such as when insurrection or invasion was threatened, or when the militias were needed to enforce the laws of the country. See U.S. Const. art. I, § 8, cl. 15 (Clause 15) ("Congress shall have the power * * * [t]o provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions * * *").⁴ However, in other cases, the degree of control the federal government would exercise over state militias was a point of extreme contention.

Nationalist delegates believed in strong federal control of the state militias in order to create a dependable, coordinated defensive force.⁵ States-rights delegates profoundly opposed

⁴ The United States, at the time the Constitution was ratified, was a nation of extreme isolationist sentiment. According to one noted commentator, "[P]eace was expected to be the customary state of the new nation. America would avoid aggressive war abroad and enjoy in turn 'an insulated situation' from the great powers of Europe * * * . This placid view of foreign relations precluded any explicit consideration of the use of American force abroad, except for defensive naval action * * * ." W. T. Reveley, *War Powers of the President and Congress* 61 (1981).

Thus, it might be that the Framers intended the militia to be available whenever the security of the union was threatened, and that insurrection, invasion, and the need to execute the law were the only such threats that the Framers, given their world view, specifically contemplated.

⁵ Early in the Constitutional Convention, for example, Alexander Hamilton presented a proposal urging "the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them." See J. Madison, *Notes of Debates in the Federal Convention* 164 (Hunt 1920). The Convention ignored Hamilton's proposal.

such federal power.⁶ These delegates voiced fears that powerful federal authority over the state militias would, like the existence of a large standing army, lead to military abuses by the new government. They particularly feared that such authority would allow the federal government to tyrannize defenseless individual states and their citizens⁷ and could leave the states without the means to meet their own public needs.⁸

The debate between these factions was vigorous, for neither extreme had sufficient support at the Convention for its

⁶ Madison's notes from the Federal Convention indicate the strong opposition many delegates voiced to giving the federal government too much control over the militia.

Delegate Oliver J. Elsworth of Connecticut:

The whole authority of the militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power. He thought the [general] Authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. It must be vain to ask the States to give the Militia out of their hands.

Delegate John Dickinson of Delaware:

We are come now to a most important matter, that of the sword. His opinion was that the States never would nor ought to give up all authority over the Militia. He proposed to restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia.

Madison's Notes of the Federal Convention, reprinted in, S. Rep. No. 695, 64th Cong., 2d Sess. 33 (1917) (*The Militia*).

⁷ Delegate Elbridge Gerry of Massachusetts feared that federal control over the militia would "enslave the states" and lead to a "system of despotism." *The Militia*, supra note 6, at 31, 33.

⁸ Madison's notes contain the following:

Mr. [Roger] Sherman [of Connecticut], took notice that the States might want their militia for defense [against] invasions and insurrections, and for enforcing obedience to their laws.

Id. at 34.

position to prevail.⁹ After several months of discussion and many days of hard-fought exchange on the floor of the convention, delegates, such as George Mason, began to seek a compromise which would provide the federal government with sufficient control over the militia to meet its defensive needs, while at the same time assuring the states sufficient authority to check the potential abuse of military power by the federal government.¹⁰

On August 21, 1787, the Convention was presented with a workable compromise. The new proposal provided the federal government the authority "[t]o make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the U.S." On the other hand, it preserved significant state power over the militia by "*reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by the U. States.*"¹¹

⁹ See Friedman, *supra* note 2, at 1512-20.

¹⁰ The power of states-rights delegates to exact significant concessions from the nationalist delegates is demonstrated in the course of the debates at the Federal Convention. Mason offered three successive proposals to the Convention, each providing the states more authority over the militia than the last. Mason's final proposal sought to provide the federal government "regulatory" authority over the militia insofar as this was necessary to establish uniformity in training and arms so that the state forces could be melded into a cohesive force when the need arose. In the states' interest, Mason proposed that this federal regulatory authority would be limited to one-tenth part of each year, that appointment of officers would be in state hands, and that the states would be exempt from federal authority whenever they needed to use their militia on state business. This, however, did not satisfy the states-rights delegates, and the matter was referred to a central committee for resolution. *The Militia*, *supra* note 6, at 31-35.

¹¹ *The Militia*, *supra* note 6, at 34 (emphasis added). This compromise, with minor stylistic changes, was ultimately approved by the Convention.

Delegate Hamilton declared that the authority to appoint officers was given to the states in order to secure for them "a preponderating influence over the militia." *The Federalist* No. 29, at 185 (A. Hamilton) (J. Cooke ed. 1931) (Cooke). Moreover, the debates at the Convention show that the training clause was retained in the text of the Constitution to ensure that the power to "organize, arm, and discipline" state forces given the federal government by the militia clauses did not surreptitiously extend federal control over the actual training of the militia.¹²

¹² Clause 16 provides Congress with the power to "discipline" the militia and reserves to the states "the Authority of training the Militia according to the discipline prescribed by Congress." Amicus curiae, the National Guard Association of the United States, urges us to read the term "discipline" broadly enough to provide for federal control over the training process.

In examining the debates at the Constitutional Convention, we note that Delegate Sherman suggested that the clause relating to training should be deleted, because he believed it "unnecessary." He believed that the states would obviously retain this authority unless they specifically ceded it to the federal government. *The Militia*, *supra* note 6, at 35.

In response, Delegate Elsworth cautioned Sherman on this point. Madison's notes contain the following:

Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be so expounded as to include all power on the subject.

Id.

After hearing Elsworth and likely realizing that reserved powers left to the states might not be sufficient to preserve state authority over the training process, Mr. Sherman withdrew his motion to delete the training clause. *Id.*

Moreover, the debates at the Constitutional Convention indicate the power to discipline, at its broadest level of interpretation, means the power to prescribe methods of training, rules of conduct for the militia, penalties for the violation of such rules, and the means to administer these penalties. This power was believed

While this compromise would ultimately win the approval of a majority of the states present at the Convention, many states-rights advocates believed that the plan still granted the federal government too much authority. One of their most recurrent claims was that the proposed clause allowed the federal government to abuse its military power by sending citizens far from home for indefinite periods in furtherance of military schemes objectionable to the states.¹³

Supporters of the compromise, in response, assured potential opponents of the Constitution that the national

necessary to assure potential coordinated movement on the field of battle. It also assured the federal government of troops who uniformly understood military rules of conduct and who understood that they were uniformly subject to the same penalties for infraction of these rules. See *The Militia*, *supra* note 6, at 35; see also *Perpich v. United States Dep't. of Defense*, 606 F. Supp. at 1325 n.9.

We thus reject the contention of the National Guard Association.

¹³ In a newspaper article urging the state of Maryland not to ratify the Constitution, Luther Martin, a delegate to the Federal Convention from that state, declared the proposed system would enable the government:

wantonly to exercise power over the militia, to call out an unreasonable number from any particular state without its permission, and to march them upon and constitute them in remote and improper services. * * * In the proposed system the general government has a power not only without the consent but contrary to the will of the state government, to call out the whole of its militia, without regard to religious scruples, or any other consideration, and to continue them in the service as long as it pleases, thereby subjecting the freemen of a whole state to martial law and reducing them to the situation of slaves.

Letter of Luther Martin in *The Maryland Journal*, March 18, 1783, reprinted in, *The Militia*, *supra* note 6, at 119; see also Remarks of Luther Martin before the Maryland House of Representatives, November 20, 1787, *id.* at 117-118. Similar fears were also expressed at the Pennsylvania ratifying convention. See *Pennsylvania and the Federal Convention* 598 (McMaster & Stone ed.).

government would only send the militia away from home in emergencies, such as when invasion or rebellion was threatened or when there was a need to execute the laws. See *The Federalist No. 29*, Cooke at 187. In other situations, they asserted, the states and the people would assure that the federal government did not abuse its control of the militia. Hamilton emphasized that the militia were under the "preponderating influence" of the states. *Id.* at 186. Thus, he continued, "What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits, and interests?" *Id.* Hamilton concluded that, if the federal government attempted to send state troops on such adventures, its action would be based not on authority granted in the Constitution but rather on "imagined intrenchments of power." He believed that the states and the people would not tolerate such clear violations of the law.¹⁴

Madison, in like manner, declared that the authority of the states "as coequal sovereigns," together with the political power of the people, would form a significant check on the potential use of state militias for military adventures by the federal government. He stated:

Can we believe that a government of a federal nature, consisting of many coequal sovereigns, and particularly

¹⁴ Specifically, Hamilton declared that if the central government attempted such an abuse:

whither would the militia, irritated by being called upon to undertake a distant and distressing expedition for the purpose of riveting the chains of slavery upon a part of their countrymen direct their course, but to the seat of the tyrants who had meditated so foolish as well as so wicked a project; to crush them in their imagined intrenchments of power, and to make them an example of the just vengeance of an abused and incensed people?

The Federalist No. 29, Cooke at 186 (emphasis added).

having one branch chosen from among the people, would drag the militia unnecessarily to an immense distance. This, sir, would be unworthy of the most arbitrary despot. They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, and drawing on themselves the general hatred and detestation of their country.

3 Elliot, *supra* note 2, at 381-82.¹⁵

B. The Guarantee of Republican Government Clause

The Guarantee of Republican Government Clause provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

During the ratification debates, many of the delegates to the state conventions feared that the federal power to suppress domestic violence in individual states provided by this clause, together with the federal power over the militia set forth in Clauses 15 and 16, posed a serious threat to the states in the form of unchecked federal military power. James Madison responded forcefully to these suggestions and, in so doing, provided clear support for the principle that reserved state

¹⁵ Much of the discussion concerning state power to resist federally directed use of state troops concerned the federal missions within the United States. This strengthens the application of this principle to the present dispute. The Framers, it must be remembered, were strongly isolationist in their sentiments. See *supra* note 4. Thus, if they supported a state check on national military operations that would take state forces far from home for indefinite periods within the United States, they would certainly object to unchecked federal use of the militia overseas.

authority over the militia was designed as an explicit check on the potential abuse of military power by the federal government.

In the Virginia convention, Madison stated:

The authority of training the militia, and appointing the officers, is reserved to the states. Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repel invasions: *these are the only cases wherein they can interfere with the militia* * * * .

3 Elliot, *supra* note 2, at 90 (emphasis added).

Several days later, Patrick Henry declared that Clauses 15 and 16, together with the Guarantee of Republican Government Clause, gave the federal government "unbounded control over the national strength" and "unequivocally relinquished" the states' control over their militias. *Id.* at 422-24. In like manner, William Grayson repeatedly argued that under the proposed constitution, Congress could call out the militia whenever it desired and thus there was "no check" on federal control over the militia. *Id.* at 417-18, 421.

In response, Madison reasoned that practical necessities required dividing power over the militia between the federal government and the states. Following from this, he continued:

If [power over the militia] must be divided, let him [Henry] show a better manner of doing it than that which is in the Constitution. I cannot agree with the other honorable gentleman [Grayson], that there is no check. *There is a powerful check in that paper. The state governments are to govern the militia when not called forth for general national purposes; and the Congress is to govern such part only as may be in the actual service of*

the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the Service of the United States. *It is, then, clear that the states govern them when they are not.*

Id. at 424 (emphasis added).

C. The Second Amendment

The second amendment to the Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const. amend. II.

This amendment was made to the Constitution to reassure states-rights advocates who feared that the power of a large federal standing army would diminish the "security of a free state." The second amendment guaranteed the perpetual existence of a viable militia, as a continued check on the military power of the federal government. As the Supreme Court stated in *United States v. Miller*, 307 U.S. 174 (1939), "With the obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. [The second amendment] must be interpreted and applied with this in view." *Id.* at 178.¹⁶

D. The Framers' View of the Interplay of the Army and Militia Powers

It is not clear that the Framers contemplated the army power superseding the militia power in any circumstance.

¹⁶ For further evidence supporting this view of the second amendment, see 1 *Annals of Congress*, 749-52, 766-67 (J. Gales, ed. 1789); 1 S. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* App. 300 (1803); 3 J. Story, *Commentaries on the Constitution of the United States* §§ 1890-91 (1833).

However, if they did, such occurrences could only be in narrowly confined situations, such as national exigencies or situations in which the national security was threatened.

The Constitution provides Congress with the power "To Raise and support Armies * * *," U.S. Const. art. I, § 8, cl. 12, and the power "To make all Laws which shall be necessary and proper to carry into Execution [these powers] * * *." *Id.*, cl. 18.

In terms of the militia, Clause 15 provides that Congress shall have the power:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions * * * .

Clause 16 gives Congress the further power:

To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, *reserving to the States respectively*, the Appointment of the Officers, and *the Authority of training the Militia* according to the discipline prescribed by Congress.

Id. (emphasis added).

In *The Federalist No. 23*, Alexander Hamilton discussed the scope of the Constitution's army power clause in the following terms:

The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy*

them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.

* * * *

Whether there ought to be a Federal Government intrusted with the care of the common defence, is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to the complete execution of its trust. And unless it can be shewn, that the *circumstances which may affect the public safety* are reducible within certain determinate limits; unless the contrary of this proposition can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the *formation, direction or support* of the NATIONAL FORCES.

The Federalist No. 23, Cooke at 147-48 (emphasis added).

The government asserts that this passage indicates the Framers believed the power to raise armies could supersede reserved state authority over the militia at will.

In response, we believe *The Federalist No. 23* does not support the government's interpretation. First, in this essay, Hamilton was writing of the "army power." There is no

reference—of any kind—in *The Federalist No. 23* to the interaction of the army power with the militia power. There is no reference to the militia or to the militia clauses at all. Second, when Hamilton did actually discuss the militia power explicitly in *The Federalist No. 29*, it directly contradicts the interpretation the government gives *The Federalist No. 23*.

Strange as it may now seem, the Framers feared that if the militia did not exist to protect state interests, the army might be used by the federal government to oppress the states and their citizens.¹⁷ Thus, Hamilton, in *The Federalist No. 29* (along with Madison in *The Federalist No. 46*), declared that an essential purpose behind the states' reserved authority over the militia was to guard against the dangers of the federal army.¹⁸

¹⁷ See *supra* note 7.

¹⁸ Specifically, Hamilton declared that a strong militia obviated the need for a potentially oppressive federal army:

[I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and in the use of arms, who stand ready to defend their own rights and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army; the best possible security against it, if it should exist.

The Federalist No. 29, Cooke at 184-85.

Next, responding to the argument that the Constitution's militia clauses provided the federal government the power to oppress the states with their own militias, Hamilton continued:

There is something so far fetched and so extravagant in the idea of danger from the militia, that one is at a loss to treat it with gravity or with raillery * * *. What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary; while the particular States are to have the *sole and exclusive appointment of the officers*? If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the Federal Government, the

Thus, Hamilton *could not have meant* that the army clause has the power to supersede the reserved state authority over the militia at will. If the federal government could use the army power at will to make the militia a federal force under its plenary control, then the militia clauses could not serve their intended purpose to protect the states against potential oppression by the federal army.¹⁹

circumstances of the officers being in the appointment of the States ought at once to extinguish it. *There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.*

Id. at 185 (emphasis added).

In a similar vein, Madison wrote:

Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger * * *. To these [a standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

The Federalist No. 46, Cooke at 321.

¹⁹ The dissent points to the fact that Hamilton in *The Federalist No. 29* argued that the militia should be regulated and disciplined by Congress. This, however, does not diminish Hamilton's assertion of the states' "preponderating influence over the militia," nor does it in any way contradict the principle of state control of the militia as an essential check on federal military power.

The dissent next asserts that the existence of other structural provisions in the Constitution designed to protect against the dangers of a standing army—see, e.g., Art. I, § 10 (two year limitation on appropriations for the army); Art. IV, § 4 (guarantee of republican government for the states)—somehow demonstrates that the militia was not designed as a check. We believe that these

Given the basic nature of this contradiction (and the fact that *The Federalist No. 23* does not even discuss the militia), it is likely that Hamilton was simply writing about the broad authority of the army power to serve the national defense, without reference to the militia power. Alternatively, *The Federalist Nos. 23 and 29* can be read together to allow the army power to supersede the militia power in more tightly confined circumstances.

Hamilton, in *The Federalist No. 23*, speaks of the broad and unhindered sweep of the army power very clearly in the context of unforeseeable "national exigencies," or, phrased in other ways, in terms of the "circumstances that endanger the safety of nations," or "circumstances which may affect the public safety." Clearly, these phrases are significant to Hamilton, and by reading such a "national exigency" as a necessary requirement before the army clause can supersede state authority over the militia, the seemingly contradictory messages of *The Federalist No. 23* and *The Federalist Nos. 29 and 46* can be harmonized.

If the authority of the army clause to supersede the reservation of state authority in the militia clauses is limited to "national exigencies" or "circumstances that endanger the safety of the nation," federal power over the militia can only "trump" the state power when the whole union, or the national interest, is in some way threatened. If such a threat did

other provisions support the notion that the Framers were deeply afraid of a standing army and were prepared to take concrete constitutional steps to guard against its power. Thus, the existence of these other provisions actually bolsters the argument that state control of the militia was designed as a check on the federal military power.

not exist, the states would then be protected from the oppressive exercise of federal authority by the militia clauses.²⁰

E. The Framers and Faction

Certain powers, such as reserved state authority over the militia, were enumerated in the Constitution in order to be insulated from uncontrolled and potentially irresponsible short-term political reaction. Such powers represented fundamental structural decisions by the Framers, based on their view of political society. They realized that, unless insulated, these powers could be eliminated in the heat of the moment by ill-considered political reactions to popular outcry. See *The Federalist No. 10* (J. Madison).

III. The Text of the Constitution

The plain language of Article I, Section 8, Clause 16 of the Constitution "*reserv[es] to the States respectively . . . the Authority of Training the Militia . . .*" This is an unambiguous command in the text of the Constitution. The government has a nearly insurmountable burden in justifying actions in derogation of it.

IV. The Supreme Court

In the *Selective Draft Law Cases*, 245 U.S. 366 (1918) and *Cox v. Wood*, 247 U.S. 3 (1918), the Supreme Court held that

²⁰ The government also cites George Washington's statement "that Congress has the power by the proper organization, disciplining, equipment and development of the militia to make it a national force, capable of meeting every military exigency of the United States." H. Rep. No. 297, 34th Cong. 1st Sess. 2 (1916) (emphasis added). In response, it is likely that Washington was speaking of those exigencies outlined in Clause 15—insurrection, invasion, and executing the laws. However, even assuming that the Framers wished the militia to be a national defense force capable of "meeting every military exigency of the United States," this does not mean that the army power and the necessary and proper clause can transform an entity largely controlled by the states into a part of the federal government at any time and for any reason.

the power to declare war and the power to raise and support armies invoked together can supersede reserved state authority embodied in the militia clauses. Hence, because the Montgomery Amendment was not passed under the authority of the war power, these cases are distinguishable from the present dispute.

In *dicta*, the *Selective Draft Law Cases* stated that, in the absence of a declaration of war, the army clause and the necessary and proper clause can supersede the states' reserved authority over the militia *only* if the government determines the existence of a national exigency.

A. The Court's Holding

The *Selective Draft Law Cases* are clearly distinguishable from the present dispute. The Selective Draft Law of May 18, 1917, ch. 15, 40 Stat. 76, was passed in the midst of national emergency, shortly after Congress had declared war on Germany. The act unambiguously recites that the country was faced with an "emergency, which demands the raising of troops in addition to those now available." 40 Stat. at 76. Further, the Court declared that the statute at issue was enacted under the war power.

It stated:

[T]he possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "*to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces.*" Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for

carrying into execution the foregoing powers." Article I, § 8.

245 U.S. at 377 (emphasis added).

The Supreme Court, in a unanimous opinion by Chief Justice White, held that the conscription statute passed under the powers to declare war and to raise and support armies, together with all the other military powers available to the federal government, gave the federal government authority to conscript male citizens. Further, it held that this authority was not limited by the states' reserved authority over the militia. The Court's holding was succinctly summarized four months later in another opinion, on a closely related issue, by Chief Justice White, writing again for a unanimous Court.

The Chief Justice wrote:

[O]n the face of the opinion delivered [in the *Selective Draft Law Cases*] the constitutional power of Congress to compel military service * * * was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies, and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate,

and for the purpose of the war power, wholly incidental if not irrelevant and subordinate, provision concerning the militia, found in the Constitution.

Cox v. Wood, 247 U.S. at 6 (emphasis added).

Thus, the Court's holding in the *Selective Draft Law Cases* does not support the government's argument. The Court declared that in the middle of a war—one of the most extreme situations a nation or government can face—that the federal government can use all its military powers combined to supersede the states' reserved authority over the militia.²¹ This is

²¹ In order to preserve the applicability of the *Selective Draft Law Cases* to the dispute before us, the dissent states that *Lichter v. United States*, 334 U.S. 742, 757 (1948) "described Congress' 'war power' in a manner which apparently comprehends all the grants of authority in the specific clauses of article 1, section 8 that concern provision for the common defense." Following from this, it asserts that the powers to raise and support armies, and to regulate and call for the militia (along with the authority of granting letters of marque and reprisal, building fleets, laying and collecting taxes, etc.) are "part of the war power." "Thus," the dissent concludes, "the legitimacy of Congress' exercise of authority in military affairs does not necessarily rest on the * * * express declaration of national security emergency advanced by the majority." *Id.* See post, section I.

Lichter, however, does not support the dissent's position. In that case, the Supreme Court declared that a statute designed to recover excess war profits (the Renegotiation Act) was a valid exercise of the power to raise and support armies and the necessary and proper clause during a declared war. 334 U.S. at 757-58. The Court never stated that the army or the militia clauses (or any of the other Art. I, § 8 clauses) are "a part of," or in any sense equivalent to, the specific power of Congress "to declare war." Thus, the *Selective Draft Law Cases* remain clearly distinguishable.

In the end, the Court mentions the term "war power" only once in *Lichter* and in a way that provides no support to the dissent's position. After discussing the power to raise and support armies and the necessary and proper clause, the Court outlines the central issue of the case:

completely different from the position that the government can assume plenary control over state forces at will. The Court's position clearly allows the militia clauses substantial integrity when the national government does not face a crisis. The government's position essentially eliminates reserved state authority.²²

In view of [these powers], the only question remaining is whether the Renegotiation Act was a law "necessary and proper for carrying into Execution" the war powers of Congress and especially its power to support armies.

Id. (emphasis added).

Here, the Court, in an extremely casual sense, simply discussed the power to raise and support armies as one of the "war powers" of the federal government *during a declared war*. (In a similar vein, the Court had earlier suggested that some of the powers provided the Congress in Art. I, § 8 "implement[] the Congress and the President with power to meet the varied demands of war." *Id.* at 755 n.3.) The *Lichter* Court never suggested that the army clause or the militia clause (or any of the Art. I, § 8 clauses) represented "war powers"—whatever that term may ultimately mean—absent the existence of a state of war.

In essence, independent of supporting precedent, the dissent asserts that the "common defense clauses," and, in particular, the powers to raise and support armies and to call forth the militia, are "war powers" that the Congress must have without limitation—in all circumstances—in order to provide for the common defense.

In response, we believe that when war is declared, or at any time the national security is threatened, Congress has plenary authority in these areas. Moreover, in terms of providing for the common defense in the absence of war, we fully recognize that the power to raise and support armies is "broad and sweeping." See *United States v. O'Brien*, 391 U.S. 367, 377 (1968). However, in the absence of war, national exigency or the consent of the states, the dissent has not provided sufficient authority to persuade us that the power to raise and support armies is sufficiently broad to overcome at will the states' explicitly reserved constitutional authority over training the militia.

²² The *Selective Draft Law Cases* may also be distinguishable on a second ground. The conscription statute at issue there drafted the members of the National Guard (militia) into the army as

B. The Court's Dicta

There is *dicta* in the *Selective Draft Law Cases* stating that the army clause can supersede the reserved state authority over the militia, but only if the Congress determines there is a "national exigency." In this *dicta*, the Court also reaffirms that the militia clauses reserve to the states authority over training the militia. Finally, although the Court believes that there are exceptional circumstances in which the army clause can override the militia clauses, this authority should not be read to confuse the two "distinct and separate" powers or to "weaken or destroy" the integrity of the militia clauses.

The *dicta* concerning the interplay of the army and militia powers begins with the Court noting that an improved understanding of the scope of these provisions can be gained by comparing the powers of the federal government before and after the Constitution was ratified. Under the Articles of Confederation, Congress had the right "to call on the states for forces." 245 U.S. at 382. Correspondingly, the states had an inescapable duty to furnish troops when called. This, "embraced the complete power of government over the subject." *Id.* The Court analogized this power to the authority to raise armies under the Constitution.

citizens, not as *militiamen*. For this reason, the government argued that the power to draft *citizens* in no way infringed upon the reserved rights of the states over the *militia*, and thus the Court did not have to reach the militia clause arguments. See *Selective Draft Law Cases*, 62 L.Ed. 349, 352 (1918) (summary of oral argument). See also Friedman, *supra* note 2, at 1496 and Comment, *supra* note 2, at 624 & n.157. But see *Thoughts on the Conscription Law of the United States*, in *The Military Draft: Selected Readings on the Constitution* 207-18 (M. Andresen ed. 1982) (draft opinion found in the papers of Chief Justice Taney finding that federal conscription law directed toward citizens, as opposed to *militiamen*, implicated (and in fact violated) the militia clauses of the Constitution); Freeman, *The Constitutionality of Peacetime Conscription*, 31 Va. L. Rev. 40 (1944).

However, following immediately on the heels of this description of "the army sphere," the Court explicitly cautioned that this power was not "at once obligatory" (i.e., "immediately usable" or "controlling") over the states. Rather, its use was confined to those "exigencies" in which Congress, in its discretion, saw fit to use the power.²³

The Court stated:

But the duty of exerting the power thus conferred in all its plentitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play.

Id. at 382-83 (emphasis added).

The Court then continued its comparison of the Articles of Confederation to the Constitution. Under the Articles, the Court declared, there was an open area of authority that, in the absence of the proper exercise of the power to raise armies, left the states with control over the militia. This control was, in the Court's view, analogous to the authority reserved to the states under the militia provisions of the Constitution.

The Court next explained that the militia clauses also provided further positive powers to Congress. The Court noted that Clause 15 allowed Congress to make use of the militia when insurrection or invasion was threatened and to execute the laws. Clause 16 also provided Congress with some power

²³ Chief Justice White, four months later, in *Cox*, clarified beyond doubt that his holding in the *Selective Draft Law Cases* was based on the authority of the war and army powers exercised together. Thus, by the use of the term "exigencies" here, the Chief Justice may have meant circumstances in which the war power was invoked. If this is the case, then this language is not dicta. However, if by "exigencies," the Court meant a national crisis or threat short of war, then this discussion was not essential to the specific holding of the case.

over the organization and training of state militias. However, in this regard, the Court carefully declared that *the militia clause left the specific "carrying out of" (i.e., the specific authority over) the organization and training of the militia to the states.* *Id.* at 383 (emphasis added).

The Court found that these "fine-tuned" powers given to Congress in the militia clauses were created to "diminish" or limit the use of the awesome army power—and its attendant dominance over state authority—to those situations in which the exercise of such vast power was *strictly necessary*.

The Court stated:

*[The Militia Clause] diminished the occasion for the exertion by Congress of its military power [under the Army Clause] beyond the strict necessities for its exercise * * *.*

Id. at 383 (emphasis added).

In concluding, the Court emphasized the care required in interpreting the conflicting authority of the army and militia provisions of the Constitution. It was true, said the Court, that the militia clauses provided Congress other ways, in addition to the army clause, to exert power over the militia. These other grants of positive authority, however, did not diminish the strength of the army power which, *once properly exerted*—or in the Court's words, exerted "*only as in the discretion of Congress it was deemed the public interest required*"—was "complete and dominant." *Id.* at 383-84 (emphasis added).

Following from this, the Court found that the army power, when properly exercised, could "potentially" narrow the power of the militia clauses. This, however, did not mean that, without an exigency, the integrity of the militia clauses could be compromised. The Court carefully emphasized that the army and militia powers were "distinct and separate," that

both comprised meaningful areas of authority, and that neither area was to be "weakened or destroyed" by construing the other power too broadly.

The Court stated:

Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas, which were distinct and separate, to the end of confusing both the powers and thus weakening or destroying both.

Id. at 384.

Clearly, the Court found that the army power could supersede reserved state authority over the militia only when Congress had determined there was some sort of exigency or extraordinary need to exert federal power. In other cases, the Court found that the integrity of the militia clauses was preserved and could not be diminished by the army power.

V. *The National Exigency Requirement*

The *Selective Draft Law Cases* declared that the federal government must determine the existence of a national exigency before the army clause and the necessary and proper clause can supersede the reserved state authority over the militia. We believe the Court's *dicta* was correct.

Like the Supreme Court, we are now faced with the interplay of two constitutional provisions which have the potential to conflict in their exercise. Both have power and purpose, and thus in harmonizing these provisions, we must attempt to preserve as much of the authority of each as we sensibly can.

It is true that the Framers believed that the army power "ought to exist without limitation"—but only in the context of "national exigencies" that might endanger the country. See

The Federalist No. 23, supra. Further, Clause 15 provides for federal control of the militia only when the nation was faced with serious threats to the national security, such as invasion, rebellion, or the need to execute the laws. While we recognize that these contingencies no longer represent explicit limits on federal use of the militia (or National Guard), they do underscore the basic gravity of circumstance the Framers believed necessary before state militias could be made into a federal force.

Correspondingly, the Framers distrusted large, centralized establishments of military power, either in terms of a large federal army or a militia fully under federal control. For this reason, they divided authority over the nation's military and intended the states to retain significant control of the militias as a check on potential abuse of military power by the federal government.

In the end, if the federal government could make the militia a federal force at will, the militia's intended purpose as a check on federal military power would be frustrated.²⁴ More-

²⁴ The United States District Court for the District of Massachusetts similarly found that the government's position concerning the power of the army clause leads to the "abolition" of the militia by leaving the militia clauses of the Constitution without practical application. Specifically, the court stated:

Counsel for the defendants conceded at oral argument that [its] conception of the dual-enlistment system makes the militia dependent on Congress for its existence because, in a practical sense at least, the militia exists only when Congress does not want or need it as a part of the Army. Under such a dual-enlistment concept, pushed to the logical limit, Congress could at any time order the entire militia into active duty year-round, thus abolishing the militia and leaving the Militia Clause without practical application. A plain reading of the Constitution supports plaintiffs' contention that Congress cannot "abolish" the militia by transforming it into a part of the Army. See U.S. Const. amend. II ("A well regulated militia being necessary to

over, the Framers' intent—particularly in light of the structure of the militia clauses—cannot be fairly read to support

the security of a free State . . .); Militia Clause, *supra*, ("reserving to the States respectively . . . the Authority of Training the Militia according to the discipline prescribed by Congress).

Dukakis, supra, 686 F. Supp. at 36.

In order to avoid these problems, the court departed from the government's position and distinguished the *Selective Draft Law Cases* from the present controversy concerning the Montgomery Amendment by noting that the Selective Draft Law controversy arose in wartime. Thus, according to the court, it followed that the "present controversy presents the issue of accommodation between the Armies Clause and the Militia Clause in a context less compelling than that of *Selective Draft Law Cases*, for priority of the Armies Clause." *Id.*

While all this appears clear—and consistent with our opinion—the court, at this point in its analysis, rapidly moved to a resolution of the issue we cannot understand. It simply concluded: "Nevertheless, guided by the decisions in the dual-enlistment cases as well as that of *Selective Draft Law Cases*," the states' reserved authority in the militia clauses "does not override the legitimately exercised power of Congress '[t]o raise and support Armies.'" *Id.* (emphasis added).

In essence, the court acknowledged that if the militia clauses are to have any continuing meaning, there must be a line of reserved state authority over which the federal government cannot cross. However, the court neither explained where that line is nor why it believed the Montgomery Amendment falls on the permissible side of that line. In reaching its conclusion, the court simply made three arguments which apparently led it to reject a broader reading of state authority over the militia.

We find none of these arguments persuasive.

First, the court asserted that "[i]f the Militia Clause is interpreted as limiting Congress' power to order the militia to active duty as part of the Army, then the Armies Clause would be without practical application because the states could enlist all citizens in the militia and thereby 'abolish' the army." *Id.*

This assertion is incorrect. The Constitution provides that Congress can make the militia part of the army in times of insurrection, rebellion, and when there is a need to execute the laws. Moreover, even prior to the Montgomery Amendment, it had long been understood that in a national emergency or exigency, the

plenary federal control of the militia, absent a threat to the national security.

Based on these considerations, we conclude, as did the Court in the *Selective Draft Law Cases*, that before the federal government can exercise its army power to supersede the reserved state authority over the militia, its actions must be motivated by a state of events which amounts to a "national exigency" or, in other words, a situation in which the national security faces a specific threat.

Implied in this requirement, to assure its observance, is the necessity of an affirmative declaration. Thus, before the legislative or executive branch can use the authority of the army

militia could be put under federal control. Thus, a broad reading of constitutionally reserved state authority over the militia could not logically lead to "abolition" of the army.

Second, the court argued that it is absurd to read the militia clauses as precluding federal training missions without state consent while at the same time permitting operational missions without such consent. *Id.* at 37-38. In response, prior to the Montgomery Amendment, each of the potential circumstances in which National Guard units could be ordered to federal service for operational missions without consent were not inconsistent with basic state control over the National Guard absent a national exigency or threats to the national security.

In its third argument, the court concluded that "disputes are to be resolved through the political processes (rather than in courts) where in essence they are disputes as to whether particular calls of units of the militia to temporary active duty, and the locations to which units are sent during such a period, do or do not serve national interests." *Id.* at 38.

While we thoroughly agree with this sentiment, we do not agree that this dispute turns on the question of whether it is in "the national interest" to send the Minnesota National Guard, or any individual Guard unit, to Honduras or to any other specific location. It turns on the question of whether, and to what extent, the federal government can take away authority arguably reserved to the states by the Constitution. We believe that it is proper for us to resolve such an issue.

clause to overcome reserved state authority over the National Guard, Congress or the President must first affirmatively assert the existence of a national exigency or of a specific threat to the national security.

The power to determine the existence of such circumstances belongs only to Congress or the President. Once this power is exercised, the substance of the determination cannot be challenged by the states or by individual National Guard members sent into federal service. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827). Such a challenge would involve a central "political question," *see Baker v. Carr*, 369 U.S. 186, 213, 217 (1962), and would hence not be justiciable.²⁵

Given the fact that such a requirement could not be enforced in a court challenge, it might be questioned what force it has as a check on the federal government. In response, we believe that the declaration of a national exigency or that the national security is somehow threatened is a very serious undertaking. It alerts the coordinate branches of government, the states, the citizens of the nation, and the nations of the world that the United States believes its interests are threatened and that

²⁵ In defining the term "political question," the *Baker* Court stated: Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

We believe the determination of a national exigency satisfies all of these requirements and, hence, is clearly a political question.

it is prepared to take appropriate steps. Such a determination, we believe, will not be made lightly.

VI. *From the Militia to the National Guard*

Over the last eighty-five years, Congress has reorganized the militia into the National Guard. Through these legislative changes, Congress has used its constitutional power to "organize, arm, and discipline" to better order and coordinate state National Guard units. Congressional action has also recognized the plenary authority of the federal government over the National Guard in a national emergency or exigency. Throughout this process, Congress has taken great care to observe state authority over the militia (or National Guard) and, until the enactment of the Montgomery Amendment, had not altered the underlying state-controlled character of the National Guard.

A. The Dick Act of 1903

After the poor performance of state militia in the Spanish-American War, Congress began to use its Clause 16 power to "organize, arm and discipline" the militia, together with federal funds to improve the organization and coordinate the training of state militias. Thus, after 111 years, during which the national militia laws had been relatively unchanged,²⁶ Congress in 1903 passed the "Dick Act." *See Act of January 21, 1903, ch. 196, 32 Stat. 775.* This law renamed the organized militias of the states the "National Guard." Second, beginning a trend of enormous long-term significance, the federal government began to equip state National Guards with federal funds and to train them with regular army officers. This aid was conditional, however, on compliance with federal stand-

²⁶ The Uniform Militia Act of 1792, ch. 33, 1 Stat. 271, remained the primary law regulating the militia until 1903.

ards for training and organization. In the years that followed, federal funding of state National Guards expanded dramatically, and federal authorities increasingly used the threat of funding "cut-off" to induce states to comply with federal training and organizational requirements.

It is important to note that the Dick Act carefully observed basic state authority over the National Guard. In this light, the War Department could not issue additional arms or assign regular army officers to state Guard units until the state governor explicitly requested such assistance. 32 Stat. at 777. Similarly, Guard units could not engage in joint encampments, maneuvers or field instruction with regular troops during summer training unless the governor made a formal request for such training. 32 Stat. at 777-78.

B. The National Defense Act of 1916

The National Defense Act of 1916, ch. 134, 39 Stat. 166 (the 1916 Act), continued the use of federal funds as an inducement to further federal "organizational" control over state National Guards. The 1916 Act also recognized the constitutional limits on federal control over state National Guard forces by providing that "nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace * * * ." 39 Stat. at 198 (codified at 32 U.S.C. § 109(b)). In this light, it also declared that sentences of dismissal or dishonorable discharge from the National Guard must be approved by the governors of the respective states. 39 Stat. at 209.

C. The National Defense Act Amendments of 1933

The National Defense Act Amendments of 1933, ch. 87, 48 Stat. 153 (the 1933 Act), created the "dual status" of the National Guard. The government claims this action by Con-

gress significantly altered the nature of the National Guard and its relationship with the federal government by making the Guard more readily available for federal service. Upon examination, we believe that the legislative change in the Guard's status was a limited one designed in response to a specific mobilization problem encountered in World War I. Further, it is clear that the 1933 Act did not extend federal authority beyond situations in which the nation was faced with a national emergency or exigency.

At the outset of World War I, it was believed that the militia clauses might prevent National Guard units from being called into federal service outside of the categories listed in Clause 15. Thus, volunteer units with high morale, which had trained together and were in a relatively high state of readiness, were disbanded when the war began. The government then drafted the individual members of these units into the Army, where they were reassigned to new units. This process not only hurt Guard morale but was viewed as bad federal defense policy, given that trained units are generally in short supply at the beginning of crisis periods.

The 1933 Act was primarily designed to remedy this problem by allowing the federal government to mobilize National Guard units intact "so as to eliminate the delay incident to draft." S. Rep. No. 135, 73rd Cong., 1st Sess. 2 (1933); *see also* H. R. Rep. No. 141, 73rd Cong., 1st Sess. 2 (1933). To accomplish this objective, Congress created the "dual enlistment" concept. Dual enlistment required the members of state National Guards to be concurrent members in a new entity called the National Guard of the United States (NGUS). The NGUS was a reserve component of the United States Army created under the authority of the army clause.

Based upon this dual status, the 1933 Act gave the President power to "order"²⁷ the National Guard in its army status as the NGUS into federal service in the event of a "national emergency" declared by Congress. This federal power to control the National Guard, outside of the three contingencies listed in Clause 15, was a limited one, based specifically on the authority of the army clause as delineated in the *Selective Draft Law Cases*.²⁸

The 1933 Act and its legislative history are clear that the grant of authority provided the President does not extend beyond a national emergency or exigency. In this light, the accompanying Senate report states that the "control, officering, and discipline [of the National Guard] except when ordered out pursuant to an emergency declared by Congress, [is left] with the respective States, just as at present. The relation of the Guard to the respective states during peace

²⁷ There is a difference between a "call" and an "order." Guard units and members in the active service of the United States under an *order* merge with units and members of other components in active duty. There are no territorial limitations. Guard units and members in the active service of the United States under a *call* retain their state organizational structure. They cannot be used outside the boundaries of the United States, except on United States Territories. See Comment, *supra* note 2, at 608 n.75; Montgomery, *The Relation of the Militia Clause to Compulsory Military Training*, 31 Va. L. Rev. 628, 651-53 (1945).

²⁸ The House report indicates that this authority was based on the *Selective Draft Law Cases*. See H. R. Rep. No. 141, 73d Cong., 1st Sess. 4 (1933).

The constitutional and legislative validity of the amendment to the National Defense Act to be proposed, fortified by the legislative power vested in Congress, is established by the decisions of the Supreme Court of the United States. (*Tarble's case*, 13 Wall. 397, 408; *Arver v. U.S.* (selective draft cases), 245 U.S. 366.)

Id.

is in nowise affected or altered." S. Rep. No. 133 at 2. According to the House report, the 1933 Act "reserv[ed] to the States their right to control the National Guard or the Organized militia *absolutely* under the militia clause of the Constitution in time of peace." See H.R. Rep. No. 141 at 5 (emphasis added).

Thus, the 1933 Act did not change the degree of federal control over the National Guard but merely codified the existence of preeminent federal power in a national emergency or exigency. Acknowledging the limited change in federal control over the Guard affected by the 1933 Act, one federal district court has declared that the "National Guard, while something of a hybrid under both state and federal control, is basically a state organization." See *Mela v. Callaway*, 378 F. Supp. 25, 28 (S.D.N.Y. 1974); see also *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965) ("The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution.").

D. *Johnson v. Powell*: The Vietnam War and Dual Enlistment.

In discussing the dual enlistment system, *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969), declared that it "blends" the militia and army and creates a mixed military authority designed to "avoid" the limitations of the militia clauses. While we do not quarrel with the Court's result in *Johnson*, this statement concerning the motive of the dual enlistment system is clearly incorrect.

In *Johnson*, National Guardsmen challenged the constitutionality of Pub. L. No. 89-687, 80 Stat. 981 (1966). This statute, enacted in the midst of the Vietnam War, provided the President with temporary authority, based upon a deter-

mination of presidential necessity, to order a member of the NGUS to active duty for up to 24 months.

The Guardsmen alleged, *inter alia*, that the statute violated Clause 15. Specifically, they asserted that, because the duty did not fall within the powers granted Congress in that clause (i.e., the duty did not involve insurrection, invasion, or the need to execute the laws), the statute was unconstitutional. The Court responded to this claim by stating that Pub. L. No. 89-687 was not enacted under the authority of Clause 15, but rather under the dual enlistment system which was based on the army power and the necessary and proper clause.

The Court believed that the 1933 Act somehow "blended" the army and militia powers and created a mixed military authority that could be used to avoid or circumvent the states' reserved power over the militia.

It stated:

There would be no problem [with the Guardsmen's claim] if Congress had exercised its powers under these two provisions in such a way as to maintain the separate identities of the militia and the army but the opposite is the case: Congress has provided for a blending of the militia and the army.

In 1933 Congress adopted the dual enlistment concept whereby an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States, a reserve component of the U.S. army. The express purpose of the dual enlistment concept was to avoid the limitations of the militia clause and to organize the National Guard under the broader power to raise and support armies.

414 F.2d at 1063 (footnote omitted).

In response, while we do not quarrel with the Court's result in upholding Pub. L. No. 89-687, we believe that the analysis it used was wrong.²⁹

²⁹ Although we do not here dispute the result in *Johnson v. Powell*, we would supplement the Court's analysis. Congress, two years prior to the enactment of Pub. L. No. 89-687, provided a strong statement indicating the presence of a "national exigency" in the "Gulf of Tonkin Resolution." See Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964). In this resolution, Congress specifically found that the "deliberate and repeated" attacks on United States Naval vessels in Southeast Asian waters "created a serious threat to international peace." It further declared that the "United States regards as vital to its national interest . . . the maintenance of international peace and security in southeast Asia." Therefore, the Congress declared its readiness, "[c]onsonant with the Constitution of the United States . . . , as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." *Id.* This statement of exigency, together with the exercise of the congressional powers to raise armies and to make laws under the necessary and proper clause, provides a far stronger constitutional basis for Pub. L. No. 89-687 than the *Johnson* Court's "blending" argument. (We would similarly supplement the analysis of the court in the case of *Drifka v. Bruinard*, 294 F. Supp. 425 (W.D. Wash. 1968).)

In fairness, the *Johnson* court did indirectly acknowledge that Pub. L. No. 89-687 was motivated by a threat to the national security. First, in defending the dual enlistment system, the Court suggested that its "purpose" was to make National Guard troops available to the federal government when the "national security" was threatened.

Specifically, it stated that:

[T]he statutes which make the National Guard a reserve component and state the purpose for so doing seem to bring the dual enlistment system clearly within the "necessary and proper" clause.

414 F.2d at 1063-64 (citation omitted).

The statutes the Court cited in terms of the "purpose" of the dual enlistment system were, "10 U.S.C.A. §§ 262, 263; 32 U.S.C.A. § 102." These provisions all define the basic policy underlying an order into federal service in the following identical terms:

The 1933 Act did not intend to "blend" the army and militia. The dual enlistment system in the 1933 Act was created to provide a statutory basis for the federal government to use its army power to put the National Guard under federal control in the narrow circumstances of a national emergency—nothing more. Except in national emergencies declared by Congress, control over the Guard by the states was left intact. See S. Rep. No. 135 at 2; H. R. Rep. No. 141 at 5. Moreover, Congress based its authority to create the dual enlistment system on the Supreme Court's decision in the *Selective Draft Law Cases*. There the Court declared that the army and militia spheres were "distinct and separate," that both comprised meaningful areas of authority, and that neither area was to be "weakened or destroyed" by construing the other power too broadly. 245 U.S. at 384.

Second, the dual enlistment system was not created to "avoid" the limitations represented by reserved state authority over the National Guard. As explained, the 1933 Act was based on the recognition that federal authority over the National Guard in a national emergency is preeminent. In such narrow circumstance, state authority is superseded, and thus there are no state limitations to avoid. The dual enlistment

Whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States * * * shall be ordered to active duty and retained as long as so needed.

In the end, Johnson found that Pub. L. No. 89-687 was a valid exercise of the army clause and the necessary and proper clause through the dual enlistment system. By noting that the "purpose" of the dual enlistment system was to make state troops available to the federal government when the "national security" was threatened, the Court did indirectly acknowledge that Pub. L. No. 89-687 was motivated by a threat to the national security.

system was not a clever ploy by Congress to avoid at will the state powers embodied in the militia clauses. Rather, it was simply the statutory recognition of the constitutional principle that federal authority is supreme over the National Guard in national emergencies or exigencies.

E. The Armed Forces Reserve Act of 1952

The Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 (the 1952 Act), provided for federal use of National Guard forces in situations neither contemplated by Clause 15 nor involving national emergencies. However, in these circumstances, the 1952 Act required that the federal authority requesting Guard participation first obtain the consent of the relevant state governor.

At issue in the present case are two provisions of the 1952 Act, now codified at 10 U.S.C. § 672(b) and (d). These subsections provide the federal government with authority to call state Guardsmen to active duty with the consent of their state governors. Federal training of state National Guard troops is done under the authority of these provisions. The provisions state:

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. *However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State * * * .*

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. *However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State * * *.*

10 U.S.C. § 672 (emphasis added).

With the gubernatorial consent requirement in these statutes eliminated, the government would have plenary power to put the Guard under federal control at any time and for any purpose. Such a state of affairs would clearly frustrate the reserve state authority over the militia contemplated by the Constitution, particularly by the militia training clause.

In this light, the United States Military Court of Appeals has found that the gubernatorial consent requirement of 10 U.S.C. § 672(d) "has constitutional underpinnings in Art. I, § 8 of the Constitution of the United States." *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977) (footnote omitted); *accord United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1982); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978). Moreover, although we owe no special deference to congressional judgments regarding constitutional questions, the available evidence very strongly indicates that Congress included the gubernatorial consent requirements in these provisions specifically to avoid potential conflict with reserved state authority.³⁰

³⁰ Draft versions of the legislation that would become the 1952 Act provided that National Guard units could be ordered to active duty outside of the situations enumerated in Clause 15 or the declaration of a national emergency without first obtaining the

F. The Montgomery Amendment of 1986

In 1986, the Governor of Maine refused to allow 48 members of the Maine National Guard to participate in a training mis-

consent of the relevant state governors. In response, witnesses who believed that such federal power violated the militia clause filed "voluminous comments" with the Senate Armed Services Committee. See *Reserve Components: Hearings on H.R. 4860 Before the Committee on Armed Services*, 82d Cong., 1st Sess. 473 (1951).

Specifically, General Ellard A. Walsh of the National Guard Association declared that a proposed bill without the gubernatorial consent requirement:

concentrat[ed] too much power in the Executive and too much authority in the Department of Defense, and would in a number of instances infringe not only on the authority of the sovereign states but of the Congress as well.

Id. at 483.

Walsh maintained the bill without the gubernatorial consent provisions:

very definitely violates the provisions contained in the militia clauses of the Federal Constitution, and notably article I, section 8, clause 16 thereof, which reserves to the states the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

Id. at 476, 482.

Such an arrangement, Walsh argued, would disrupt the basic constitutional principle that the Guard must be "responsive to the orders of the governor." *Id.* at 478.

Congress was also flooded with letters from state National Guard officials who pointed to the militia clause requirement for divided federal-state authority. Ernest Vandiver, Adjutant General for the State of Georgia, complained that the proposed bill "will delegate to the Pentagon the constitutional rights and powers imposed in the governors of the respective States to command their militia." *Armed Forces Reserve Act: Hearings on H. R. 5426 Before the Senate Subcommittee on Armed Services*, 82d Cong., 2d Sess. 312 (1952). The Adjutant General of Illinois, Leo M. Boyle, enclosed his prepared remarks protesting a prior proposal to "federalize" the National Guard. "I support the wisdom and farsightedness of our forefathers and the framers of the Constitution when they wrote the militia clause of the Constitution," Boyle wrote. "The National Guard system comprising as it does—

sion in Honduras. After several other governors threatened to follow suit, a Senate subcommittee began to explore the question of whether the gubernatorial consent provisions of the 1952 Act should be abolished. See *Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower & Personnel of the Senate Committee on Armed Services*, 99th Cong., 2d Sess. (1986) (stenographic transcript) (1986 Senate Hearings). The Department of Defense had counseled caution and hoped the crisis would fade over time.³¹ In the end, the subcommittee took no action.³²

One month later, Rep. Sonny Montgomery of Mississippi submitted an amendment to the proposed Defense Authorization Act of 1987 that would have prevented governors from exercising their veto power for foreign policy reasons. See Cong. Rec. H6267 (daily ed. Aug. 14, 1986). Because the proposal took the form of an amendment to the defense bill, debate on it in the House of Representatives was limited to a total of ten minutes. Moreover, there were no hearings on the amendment before it reached the floor for a vote. In response, many representatives noted the fundamental impropriety in making such a great potential change in defense policy—if not in the constitutional balance of power—without

citizen soldiers—has always been a bulwark against the concentration of military power in our Federal Government.” *Id.* at 310.

Thus, it appears that to counter the perceived “federalization” of the Guard, the National Guard Association proposed, among other things, an amendment requiring the consent of the governor of the State concerned before National Guard units could be called to active duty outside of national emergencies or the contingencies noted in Clause 15. Congress listened and enacted the gubernatorial consent provisions, 10 U.S.C. § 672(b) and (d).

³¹ See Kester, *State Governors and the Federal National Guard* 11 Harv. J. L. & Pub. Policy 177, 179 (1988).

³² The hearings were held with short notice, and many who wished to testify against the proposal were unable to do so. 1986 Senate Hearings, *supra*, at 8.

the benefit of hearings, *id.* at H6262-68 (remarks of Reps. Edwards and Schroeder) and with such limited debate.³³ The consideration of the bill was further overshadowed by ominous recurring warnings to the representatives that if they did not act quickly to eliminate the gubernatorial consent requirement, the federal government would eliminate funding to their state National Guards.³⁴

³³ With regard to the limited debate concerning the Montgomery Amendment, Rep. Dyson stated:

Mr. Chairman, the Guard has no greater friend than the Gentleman from Mississippi [Mr. Montgomery], but I think this is a bad idea. We have not had enough time to look into this; 10 minutes per amendment is not enough time to fully understand a proposal as important and as far reaching as this amendment. Cong. Rec. H6266 (daily ed. Aug. 14, 1986).

Rep. Schroeder stated:

Basically, whether you agree or disagree, I think we all agree that if [the Montgomery Amendment] is unconstitutional according to many constitutional scholars, and if we have never had hearings, and if it has been functioning this way for over 200 years, why in the world the rush to put this in with a 10-minute debate on the House floor?

I think that is playing too fast and loose.

Id. at H6267.

³⁴ For example, Rep. Montgomery warned the members of the House:

If we do not adopt this amendment, and as I have said earlier, the National Guard is dead in the water; you can forget about it. You Governors are going to lose all your equipment; you are going to lose a lot of payroll, so you had better support this amendment and let the Guard keep going.

Cong. Rec., *supra* note 33, at H6267.

Moreover, on July 15, 1986, James H. Webb, Jr. told a Senate Armed Services Subcommittee that an alternative to retaining the gubernatorial consent requirement was “to give the fullest resourcing . . . to those units that are able to participate in ‘real world’ training missions” Prepared statement of Assistant Secretary of Defense for Reserve Affairs, see 1986 Senate Hearings, *supra*, at 5-14. Ten days later, on July 25, 1986, the House

In the end, calls for deliberation and caution did not prevail, and the full House, after 10 minutes of debate, approved the Montgomery Amendment 261-159. At conference, the Senate defense bill did not contain the proposed amendment. The conferees, however, made one technical change in the House version and included a notation on legislative intent that allowed the governors to withhold consent if they needed the Guard for local emergencies.²⁵

As it became law, the Montgomery Amendment stated:

The consent of the governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

10 U.S.C. § 672(f).

By "subsections (b) and (d)," the amendment referred to 10 U.S.C. § 672(b) and (d) which were part of the 1952 Act. These subsections provide for federal orders to active duty, or to active duty for the purpose of training with gubernatorial

Committee on Armed Services strongly urged the chief of the National Guard Bureau to consider withholding funds from States that refused to participate in overseas training assignments. H.R. Rep. No. 718, 99th Cong., 2d Sess. 176 (1986).

²⁵ Specifically, the conference report stated:

The conferees reiterate that under this provision, the governor still will have the authority to block the training if he or she thinks the guardsmen are needed at home for local emergencies. The conferees intend that nothing about the words "location, purpose, type, and schedule" should constrain a governor in according appropriate priority to a state or local emergency, such as a flood or other natural disaster.

Legislative History of Pub. L. No. 99-661, 99th Cong., 2d Sess. 475 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 6413, 6534.

consent, in situations neither contemplated by Clause 15 nor involving serious threats to the nation. Thus, the Montgomery Amendment, although allowing governors to withhold consent when local emergencies threatened, eviscerates the gubernatorial consent requirement in all other situations where the governors had substantive objections to active duty missions. In short, the Montgomery Amendment gives the federal government essentially unfettered authority over state National Guard units.

VII. *The Constitutionality of the Montgomery Amendment*

A. The Intent of the Framers.

The Montgomery Amendment contravenes the intent of the Framers. The Framers designed the militia (or National Guard) to serve as a check on the potential abuse of military power by the federal government. Specifically, they intended the states to exercise control over the militia (or National Guard) when the national security was not threatened. In these circumstances, the Framers assured the states that they would have authority to withhold support from military projects of the federal government they did not support. The Montgomery Amendment allows the government to make state National Guards part of a federal force essentially at will. This eliminates the state-controlled check on federal military power. Moreover, the Montgomery Amendment specifically frustrates state authority to resist federal military operations when the national security is not threatened.

The Framers created the second amendment to guarantee the perpetual existence of a state-controlled militia (or National Guard) as a check on the abuse of military power by the federal government. By effectively ending this state-controlled check on federal military power, the Montgomery Amendment cancels this guarantee.

Because the Framers intended state militias to check the power of the federal army, it is likely that they believed the army power could only supersede the state authority over the militia in narrowly confined circumstances, such as when the national security was threatened. The Montgomery Amendment, based on the theory that the army power supersedes state militia power at will, implicitly violates the Framers' intent.

Finally, the Framers believed that rights, such as reserved state power over the militia, were enumerated in the Constitution, in part, to be insulated from irresponsible, short-term political reaction. The recent refusal of the Governor of Maine to send state National Guard forces on training missions in Honduras is simply the proper exercise of a long dormant—and clearly intended—function of the states as a part of the federal system. The Montgomery Amendment—enacted without adequate hearings in the Senate, with no hearings in the House, with no reports issued by either body, with only 10 minutes of floor debate, and under the recurrent threat of federal fund “cut-offs” to non-cooperating states—was an ill-considered backlash to the exercise of an unpopular right by the state governments. It is precisely the sort of abuse of political power that the immutability of the Constitution was intended to protect against.

B. The Constitution

The Montgomery Amendment violates the plain language of the Constitution. To further the intentions listed above, the Constitution “reserv[es] to the States respectively * * * the Authority of Training the Militia * * * .”

Although written two centuries ago, the words and the purpose behind this clause could not be more clear. The practicality—even the wisdom—of the decision to give the states

authority over training, like all of the decisions of the Framers, can be honestly disputed. However, in light of the powerful historical evidence, the fact that they made this decision for these reasons cannot be seriously questioned.

By effectively ending state control over National Guard training missions, the Montgomery Amendment violates an unambiguous command declared in the text of the Constitution.

C. The Supreme Court

The Montgomery Amendment is in conflict with the declarations of the Supreme Court. In the *Selective Draft Law Cases*, the Court stated that the army power can only supersede the states' reserved authority over the militia if the federal government, in its discretion, has determined the existence of a national exigency. Moreover, it acknowledged basic state authority over training. The Court's rationale was that the army clause and the militia clause were “distinct and separate,” that both represented meaningful areas of authority, and that neither should be “weakened or destroyed” by construing the other power too broadly.

The Montgomery Amendment is not conditioned upon a congressional determination of national exigency. It effectively withdraws state authority over training, and both “weakens” and “destroys” reserved state authority over the militia.

D. The National Exigency Requirement

Implied in the congressional determination of a national exigency is the requirement of an affirmative declaration.

The Montgomery Amendment does not declare nor require the existence of a national exigency, nor does it appear to be directed at any specific threat to the national security. Its purpose is clear. In one legislative action it withdraws, “across

the board," substantive state power over the National Guard and gives the federal government essentially unfettered control over these forces.

E. Legislation

Congressional legislation concerning the National Guard has done nothing to change its underlying state-controlled character when the national security is not threatened. The Montgomery Amendment improperly departs from an unbroken pattern of congressional deference to reserved state authority over the militia (or National Guard) embodied in the militia clauses.

F. The Foreign Policy Argument

The government argues that the Framers could not have foreseen the degree of dependence that the United States has placed on National Guard troops. *See infra* note 36. If they had, the argument goes on, they would never have intended the states to possess the veto power given them in the 1952 Act. Thus, the government asserts that the gubernatorial consent requirement allows the states to participate in defense and foreign policy decisions in ways the Framers never would have sanctioned.

In response, the Framers made a conscious decision to place the bulk of the nation's defensive forces in the hands of state troops. Moreover, through much of American history, a large percentage of the nation's defensive forces have been organized in the form of militia or state National Guards. *See supra* note 3. Second, until 1986, state authority over these forces had been almost entirely unchanged by Congress. Further, while it is true that the Framers did not want the states to make positive national defense or foreign policy, they did intend the states to be a check on potential abuse of military power by the federal government. In this light, the guber-

natorial veto requirement of the 1952 Act is a particularly apt legislative adaptation of a constitutional concept.

G. "Total Force" and the Militia Clause

The government argues that the Montgomery Amendment is necessary to ensure an effective national defense. However, it provides no evidence that the effectiveness of the national defense or of the National Guard will be diminished by an adherence to the constitutional principle of basic state control over the National Guard forces, absent a declaration of war or of national exigency.

In the last fifteen years, the National Guard has become a major part of the defensive force of the United States. After the Vietnam War and the presidential action discontinuing selective service registration, Congress decided to decrease the size of the standing military and to place increased reliance on reserve components, particularly on the National Guard. In this "Total Force" concept, the reserve components became major participants in the national defense effort.³⁶

³⁶ Secretary Webb noted in his Senate testimony that the Army National Guard provides 46% of the combat units and 28% of the support forces of the total Army. In the event of full mobilization, 18 of the 28 Army divisions would be provided wholly or in part by the Army National Guard. The Air National Guard of the United States operates and maintains more than 1700 aircraft. In the current fiscal year, the Air National Guard of the United States will provide 73% of our air defense interceptor forces, 52% of tactical air reconnaissance, 34% of tactical airlift, 25% of tactical fighters, 17% of aerial refueling, and 24% of tactical air support forces. *See* 1986 Senate Hearings, *supra*, at 56-1.

Secretary Webb further notes that the Army and Air Force National Guard are almost totally funded by the federal government. Since 1981, Congress has invested nearly \$47 billion in manning, equipping, and training these forces. For the current fiscal year, Congress appropriated and authorized expenditures in excess of \$8 billion to support their operations. *Id.*

The government maintains that the modern world has grown far more complex and dangerous than it was in 1787. The armed forces of the United States must today be able to respond rapidly to a broader range of potential threats to the national security than the Framers could have ever envisioned. Thus, the government argues, state-based limitations on federal control embodied in the militia clauses applied to a different time and different circumstances. The necessities of the modern world require this Court to act "pragmatically" and to read these anachronistic reserved powers either very narrowly or out of existence entirely.

The figures that the government cites show that the National Guard is a major part of the defensive force of the United States. However, if the national security is in any way threatened, the federal government can quickly assume total control over the National Guard by declaring a national exigency. Thus, in any situation demanding quick action, there would be no state-controlled obstacles to hinder the government's response.

The government's second pragmatic argument follows closely from the first. Secretary Webb, in his Senate testimony, explains that, because of the nation's great dependence on the National Guard, these forces must be extremely well trained. This is necessary both so that they are prepared for all future emergencies and so that, at the appropriate time, they can mesh their operation with the regular army and other reserve components. See 1986 Senate Hearings, *supra*, at 56-6-8. Specifically, Secretary Webb asserts that the National Guard units must train in foreign environments with their unusual climates and terrain, alongside their full-time army and air force counterparts in order to achieve "operational readiness." Any interference by obstinate state governors in

this training process is likely to be disastrous in terms of the Guard's ability to operate effectively in a future crisis.

In response, all of the parties to this case agree that broad training experience for the National Guard is essential to the adequate defense of the United States. Indeed, even in the midst of the Honduran training controversy in 1986, Lieutenant General E. H. Walker, Chief of the National Guard Bureau,³⁷ stated:

[N]o governor has said he opposes overseas deployment training—all have said they wholeheartedly believe in it and understand and support the need for it.

1986 Senate Hearings, *supra*, at 95-5.

Since the Guard began training overseas in the early 1970's, no governor has ever withheld his or her consent to a training mission or any type of mission—until the Guard recently began to train in Honduras. Moreover, states have never opposed training on the basis of terrain or climate. They have never opposed Guard exercises coordinated with regular forces. In short, they have never opposed the substance or content of training—nor are they likely to do so in the future. The states have only opposed an order for training when the real purpose of the order is something more than training. In the case of the Honduran controversy, the state objections all concerned

³⁷ 10 U.S.C. § 3040 provides:

(a) There is a National Guard Bureau, which is a Joint Bureau of the Department of the Army and the Department of the Air Force, headed by a chief who is an adviser to the Army Chief of Staff and the Air Force Chief of Staff on National Guard matters. The National Guard Bureau is the channel of communications between the departments concerned and the several States, Territories, Puerto Rico, the Canal Zone and the District of Columbia on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States.

the potentially dangerous implications that training in a politically explosive part of the world might have.²²

In this light, the substance of the government's training argument is better understood. The government does not argue that gubernatorial consent prevents them from exposing Guardsmen to a proper diversity of climate or terrain or that it prevents them from training alongside their full-time army and air force counterparts. This could be easily done in non-controversial areas of the world, as it has in the past. The real essence of the government's argument must then be that the National Guard be completely free to train in areas of extreme political tension if it is to be an effective fighting force.²³

²² As Senator Glenn stated at the hearings:

I know back in my own state of Ohio this question came up, why Honduras and why now? I think we ought to face that. That is the reason we are up against this thing now. Normally, we train in Panama—we have done that for a decade and a half or so—to give them jungle training.

The issue we have to address here and we have only touched on it peripherally is why Honduras? I think the concept, the view of many of the governors, is that we are looking for [political] support for a policy that all Americans do not agree with by sending people to Honduras.

I am being blunt about that, but that is the fact. That has been editorialized across the country. That is the issue here really. Does the training have to be in Honduras?

When they were being ordered down to Honduras, it was the very time there were border crossings, with reports of several hundred people being killed. The governor had the National Guard there when the perception was that we are sending our people into the combat zone. That was the public perception.

1986 Senate Hearings, *supra*, at 22.

²³ General La Vern E. Weber (Retired), former Chief of the National Guard Bureau, discussed the government's position in his testimony to the Senate Subcommittee:

I submit to you that such deployments are highly desirable, but not absolutely necessary to achieve combat readiness levels.

National Guard units can be trained to Federal standards of

This may well be the case, but the government has presented us with *no* evidence in terms of this argument.

Moreover, if the Honduran training controversy is a prototype of the dangers this country faces in the absence of the Montgomery Amendment, the following is of some interest. General La Vern E. Weber (Retired), former Chief of the National Guard Bureau, noted that the Honduran controversy had little effect on overall Guard training operations and suggested that any difficulties stemming from such a controversy in the future could easily be remedied through existing regulations and the withholding of federal funds from non-cooperative states. He stated:

professionalism right here in the United States, in the schools and maneuver areas Congress has provided for that purpose.

Deployment to areas outside the CCNUS [Continental United States] is highly desirable as adventure training, to enhance morale and give the troops a broad experience, but I submit to you that in a training sense, driving a bulldozer in Fort McCoy, Wisconsin, is very similar to driving a bulldozer in Honduras.

1986 Senate Hearings, *supra*, at 100-01.

General Weber also stated:

The narrow issue here is whether or not Congress believes that Federal training standards must include duty in Honduras, regardless of the arena of operation to which units are intended to be deployed in some future conflict. If the Congress believes that, then all Army and Air units, Regular Guard and Reserve must be sent to Honduras.

Id. at 100.

General Weber concluded:

Any legislative action at this time would not serve to improve Guard readiness or availability in the event of emergency or war.

If the Congress is concerned that the Chief of the National Guard Bureau cannot employ current directives to ensure proper training of the Guard forces, they can, and should, direct that he report periodically on any instances of refusal to train which are likely to adversely impact on readiness.

Id. at 102.

Based on my discussions with key leaders of the Guard, it is my opinion that recent public comments and actions by state authorities have not impaired the nation's ability to rely on the National Guard nor have they adversely impacted the units' readiness.

I strongly agree and believe the recent actions are only an irritant which can be dealt with through existing statutes and regulations. The Chief of the National Guard Bureau has the authority to manage Federal funds appropriated for Guard Training and can direct action as Chief of the agency serving as the line of authority between the Army and Air Force and the states.

1986 Senate Hearings, *supra*, at 99.⁴⁰

One last *pragmatic* consideration. It is important to realize that National Guard forces were involved in the recent invasion of Grenada and the bombing of Libya. In both of these instances, the Guard was activated under 10 U.S.C. § 672, for

⁴⁰ General Walker described in careful detail the "crisis" in National Guard training operations that led to the Montgomery Amendment:

In 1986 [the year the Montgomery Amendment was enacted] more than 42,000 members of the Army and Air National guards trained overseas in 46 countries. More than 9,000 Army and Air Guard personnel from 43 states and territories trained in Central America alone.

* * * *

The few Governors that have precipitated [the Montgomery Amendment] have stopped a total of 48 people from training in one country—Honduras—not the other 45 countries. *Those 48 people constitute .0001 percent of the total deploying force—less people than report to sick call on an average base on a given day, less people than have had to forego scheduled training for employer support reasons and less people than have had to forego participation due to other commitments. Clearly 48 people in comparison to the total deploying forces or the entire Guard strength is insignificant in terms of impact.*

1986 Senate Hearings, *supra*, at 94-3-5 (emphasis added).

"training", rather than under the operations provisions, 10 U.S.C. §§ 673, 673a, 673b, which require a declaration of emergency or consultation with Congress. *See* Testimony of Secretary Webb, 1986 Senate Hearings, *supra*, at 83;⁴¹ Com-

⁴¹ The following exchange concerning the recent bombing of Libya by American forces comes from the 1986 Senate Hearings:

Senator Levin: Would [the Libyan raid] be treated as a training mission?

Mr. Webb: That was under 672(d) which is for training.

Senator Levin: So, that use of National Guard troops in Libya was considered a training mission by the DoD?

Senator Warner: Under the law.

Senator Levin: Is that the way DoD considered it, training?

Mr. Webb: Under the law.

What you have is the compression of missions once the Total Force Doctrine came into effect so that you have National Guard units all over the world on any given day under the rubric of 672, which is a problem because you have to go all the way from 672 to a Presidential 100-K call-up with very little in between.

I understand where you are going and it is a problem. We have a difficult time defining what is an operational mission with the compression of these missions under the Total Force Doctrine.

Senator Levin: I wondered whether DoD considered that a training mission in Libya? That is my question.

Mr. Webb: I do not have authority to speak on how Secretary Weinberger would have termed that.

Senator Levin: Could you answer that also for the record? Could you check with the Secretary's office and let us know that, too?

1986 Senate Hearings, *supra*, at 82-83.

Secretary Webb later sent the subcommittee the following written response to Senator Levin's question:

The Air National Guard aircraft utilized in support of the Libyan raid was already in Europe as part of routine tanker task force activities. Under long standing practice, Guard and Reserve air refueling aircraft supplement active force refueling aircraft assigned to a tanker task force stationed in Europe. The tanker task force provides day-to-day refueling training opportunities to Guard and Reserve crews, and is also available to the theater commander to meet any operational requirement

ment, *supra* note 2, at 636. Some commentators have suggested that this use of these active duty provisions for "training" was "surreptitious" and designed to elude the statutory requirements for operational missions. *See* Comment, *supra* note 2, at 636. Whatever the case, prior to the Montgomery Amendment, the governors, as the representatives of their states, provided at least some check on the potential abuse of these provisions. Without the governors, there would be no check at all.

VIII. *Conclusion*

The world has changed since 1787. It is smaller than it once was. We understand that today the nation's military forces often need to respond instantaneously—that the federal government may need to use troops in a variety of situations short of declared wars. Yet, the world has not changed so dramatically that we can no longer abide by the provisions of our Constitution, and we are not convinced that the national defense will be harmed by our respecting reserved state authority over the National Guard. The requirement that the President or the Congress declare the existence of a national exigency—particularly when that statement is not subject to challenge—is a small concession indeed to the doctrine of separation of authority which underlies our constitutional system.

When the nation did not face a specific threat from within or without, the Framers wished part of the nation's military power to be under the control of the states to check the possibility of abuse of military power by the federal government.

that may arise. The Libyan raid was just such an operational requirement. The Guard aircraft was not sent to Europe for the specific purpose of participating in the Libyan raid. Under section 672(d) the crews can be on active duty, including active duty for training. The crew of this Guard aircraft was on active duty.

Id. at 83 (attachment).

In this vein, the Constitution of the United States "reserv[es] to the States respectively * * * the Authority of training the Militia * * * ." When the words and the intent come together in such a manner, our duty is clear.

Thus, for the foregoing reasons, we find the Montgomery Amendment, which deprives the states of their reserved authority over training the National Guard, violates Article I, Section 8, Clause 16 of the Constitution of the United States. We therefore reverse the judgment of the district court and remand this matter to it for further proceedings consistent with this opinion.

MAGILL, Circuit Judge, dissenting.

This case presents the issue whether a federal statute that permits National Guard members to be ordered to active duty training without a governor's consent impermissibly infringes authority reserved to the states under the Constitution. Art. I, § 8, cl. 16. In my view, the district court correctly held that Congress' plenary authority to provide for the national defense encompasses the authority to train the Guard while in active federal service. *Perpich v. United States*, 666 F. Supp. at 1324. Therefore, I respectfully dissent.

I am in substantial agreement with the succinct analyses in this case by Judge Alsop and in a similar case by Judge Keeton in the Eastern District of Massachusetts. *Dukakis v. Dept. of Defense*, 686 F. Supp. 30 (E.D. Mass. 1988), *aff'd*, No. 88-1510 (1st Cir. Oct. 25, 1988). This dissent addresses particular aspects of the majority opinion which I believe are in error. The majority missteps in their derivation of the Framers' intent, and misconstrue Supreme Court precedent dealing with the relationship of the army and militia clauses. As a result, they arrive at a rule for "balancing" those two clauses that is at odds with the text and history of the Consti-

tution and unsupported by judicial authority. I offer an alternative reading of the Framers' debates on the army and militia clauses, consistent with the language and intent of those constitutional provisions.

I. SCOPE OF THE WAR POWER

The Constitution gives Congress broad authority to provide for the common defense. At times, the Supreme Court has discussed separately one or another of Congress' enumerated "war powers." See, e.g., *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1872). Other times, the Court has described Congress' "war power" in a manner that apparently comprehends all the grants of authority in the specific clauses of article I, section 8 that concern provision for the common defense. See *Lichter v. United States*, 334 U.S. 742, 757 (1948).

The war power, then, is not merely the power "to declare war" in clause 12. Congress is empowered to lay and collect taxes "for the common defense." Art. I, § 8, cl. 1. The power to raise, support, and regulate armed forces is part of the war power. Cl. 12-14. The powers to regulate and call for the militia are incidental to, and not separate from, Congress' authority to provide for the common defense. Cl. 15-16. James Madison wrote that the powers conferred upon the federal government with the objective of security against foreign danger were those of "declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money." *The Federalist No. 41* at 256 (J. Madison) (C. Rossiter ed. 1961). Thus, the legitimacy of Congress' exercise of authority in military affairs does not necessarily rest on the wartime-peacetime dichotomy urged by appellants nor on the express declaration of a national security emergency advanced by the majority.

The power to raise and support armies is central to Congress' war power in times of peace as well as war, because "it is the primary business of armies to fight or to be ready to fight wars should the occasion arise." *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975). "The responsibility for determining how best our Armed Forces should attend to that business" rests exclusively with the national government, *id.*, and the courts afford great deference to congressional action under the authority to raise and support armies. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). Even in the absence of a declared war, "the constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding Congress' authority to classify and conscript for military service). See also *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 326-28 (1936) (upholding peacetime maintenance of properties constructed in wartime under power to provide for national defense).

II. ROLE OF THE RESERVE FORCE

Pursuant to its constitutional authority, Congress has established reserve components of the armed forces. 10 U.S.C. § 211, *et. seq.* The Army and Air Force National Guard of the United States (NGUS) are included among the armed forces "ready reserve" components. 10 U.S.C. § 261. The purpose of the reserve force is "to provide trained units and qualified persons available for active duty." 10 U.S.C. § 262. Congress intended that the reserve be available for active duty "in time of war or national emergency and at such other times as the national security requires." 10 U.S.C. § 262.

Reserves may be ordered to active duty "in time of war or national emergency declared by Congress." 10 U.S.C. § 672(a). Active duty is also authorized if the President declares a

"national emergency," or if he "determines that it is necessary to augment active forces for any operational mission." 10 U.S.C. § 673, 673b(a). A reservist may be ordered to active duty "at any time" with the consent of both the individual reservist and the governor of his state guard. 10 U.S.C. § 672(d). And reserves may be activated "at any time" for not more than fifteen days a year, with the governor's consent. 10 U.S.C. § 672(b). The Montgomery Amendment qualified the governor's statutory right to withhold consent.

Appellants contend that the assignment of reserves to active duty for purposes of training, without the governor's concurrence, contravenes the "authority for training" the militia reserved to the states by Art. I, § 8, cl. 16. In other words, constitutional constraints on Congress' authority over the militia underlie the consent provisions of §§ 672(b) and (d). The Department of Defense responds that NGUS Reserves' membership in state National Guard units does not circumscribe Congress' authority to train reserve forces while in federal status. Once ordered to active duty, NGUS members are in the service of the United States and thus not subject to state control. 32 U.S.C. § 325 (National Guard members in active federal duty are relieved from duty in state National Guard).

Guard members were "federalized" in 1916, when they were required to sign an oath agreeing to be drafted into federal service and to serve abroad. Act of June 3, 1916, 39 Stat. 166. The role of the Guard as a reserve component of the army was firmly established in 1933, with the dual enlistment system that gave Guardsmen a dual status as reservists in the NGUS and as militiamen in the National Guards of their respective states. *Johnson v. Powell*, 414 F.2d at 1063; *Drifka v. Bruinard*, 404 F. Supp. 425, 427 (W.D. Wash. 1968). In the Armed Forces Reserve Act of 1952, Congress defined the circum-

stances in which the Guard could be ordered to active duty as the NGUS. The governor's consent provisions were most likely political accommodations to secure support for the Act¹ and were not constitutionally compelled.²

Congress adopted the Armed Forces Reserve Act of 1952, "to provide for a more effective utilization of the reserve components, [and] to assure the maintenance of a strong and vigorous Reserve force."³ The Montgomery Amendment is consistent with the purposes underlying the 1952 measure. Congress has since incorporated the NGUS as a central component of the Armed Forces, under the "Total Force" concept.⁴ Congress' authority to provide for the common defense clearly includes the authority to provide for a reserve force. The exercise of that authority does not contravene the state's constitutional role over the militia merely because the

¹ *Reserve Components: Hearings on H.R. 4960 Before the House Comm. on Armed Services*, 82d Cong., 1st Sess. 475-76, 482-83, 788 (1951).

During the Civil War, volunteers in the Army of the United States, though no part of the militia, were organized on a militia basis, and the states were given authority to commission officers. *Weiner* at 192. Thus the 1952 Act is not the only instance where Congress, in the discretionary exercise of its army power, gave some role over federal forces to the states for political, not constitutional, reasons.

² *Perpich*, 606 F. Supp. at 1324. *But see United States v. Peel*, 4 M.J. 28 (C.M.A. 1977). In *Peel*, although the court stated that the consent requirement had both "statutory and constitutional underpinnings . . .," the constitutional reference was dictum, and the court made no analysis of the militia or army clauses.

³ H. Rep. No. 1006, 82d Cong., 1st Sess. 1 (1951).

⁴ *Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services*, 90th Cong., 2d Sess. (1966) (Testimony of James H. Webb, Jr.); H. Rep. No. 107, 98th Cong., 1st Sess. 202 (1983); *Maj. op.* at 54.

Reserves include state National Guard members ordered to active duty as federal reserves.⁵

⁵ The compatibility of the dual enlistment system with the constitutional scheme providing for both armies and militia is better understood by considering the historical context of the Guard's dual status. American defense forces have, in a broad sense, reflected a "dual structure" since the earliest days of the United States. Arms have been borne concurrently by militia and Continentals, by volunteers and regulars, by National Guardsmen in state and federal service, by organized and unorganized militia. If there is any anomaly in the dual status of our armed forces, it is that historically it has been viewed as both strength and weakness in the way America provides for its common defense.

The militia's availability as both a state and federal force enabled government at both levels to carry out important missions. In the 18th and 19th centuries, the militia served their states far more often than the United States, and were frequently employed by state governments in maintaining public order. Mahon, *History of the Militia and the National Guard*, 61-62 (1983). Minnesota's own history provides 20th century examples of state Guard forces being called to state service. *Weiner* at 218 n.202. Furthermore, the President has, on occasion, called forth the Guard to perform the tasks enumerated in clause 15. See, e.g., Executive Order No. 10730, Sept. 24, 1957, 22 F.R. 7628.

The dual structure has also been a weakness. The Continental Congress' difficulties in requisitioning the men and money necessary to wage the War of Independence were well-known to the Framers. In the War of 1812, militiamen balked at carrying out orders contrary to their understanding of the constitutional limitations to their service. In the Mexican War, volunteers were organized to carry out missions which Congress could not impose on the militia. During the Civil War, Congress again raised volunteers rather than rely on the militia, although the militia could have been called into federal service. During the Spanish War, the militia again was unavailable because foreign service was "outside the constitutional obligation resting upon the militia." *Weiner* at 187-192.

Similarly, the exercise of federal authority has been a problem at times for state uses of the militia. The militias as state forces suffered after the first World War when militiamen who had been drafted were discharged from federal service. Because no provision had been made to restore the militia status of returning guardsmen, states were left without a National Guard. *Id.* at 201, 205-06.

III. THE "CONFLICT" OF CONSTITUTIONAL CONTROL

Appellants contend that the militia clause admits of a plain meaning: the power to authorize National Guard training is reserved to the states, including the power to grant or withhold consent for particular training exercises prescribed by Congress. Appellants do not offer a plain meaning gloss of the army power, but insist that, however broad that power may be, it cannot permit Congress to accomplish by indirection what is elsewhere proscribed directly. *Anderson v. Martin*, 375 U.S. 399, 404 (1964). Appellants also refer to precedent holding that Congress' military power is subject to the constitutional requirement of due process. *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

The majority advances a rule for balancing Congress' army power with states' militia training power: congressional exercise of authority over "militia" training is permissible only (1) upon an express declaration (by the President or Congress) of "the existence of a national exigency or a specific threat to the national security," or (2) any other time when the state consents. *Maj. op.* at 35. This requirement purportedly derives from dicta in the *Selective Draft Law Cases*, 245 U.S. 366 (1918). This "exigency" rule is inappropriate because it is not obvious from the text of the Constitution, it does not square with a fair reading of the Constitution's history, and it is based on a misconstruction of the *Selective Draft Law Cases*.

The *Selective Draft Law Cases* and *Cox v. Wood*, 247 U.S. 3 (1918), are the only Supreme Court precedent addressing the scope of Congress' war power and possible limitations of that power in the militia clause. The Court held that Congress' power "to call for militia duty" was not limited by the militia

clause restrictions on the uses of federal militia. "[F]or the purpose of the war power," the militia clause was a "wholly incidental, if not irrelevant and subordinate, provision." *Cox v. Wood*, 247 U.S. at 6 (1918).

The majority reads the *Selective Draft Law Cases* to hold that "the war and army powers invoked together can supersede reserved state authority embodied in the militia clauses." Maj. op. at 23 (emphasis added). That reading ignores the Court's direct comparisons of the army power to the militia power without reference to the power to declare war.⁶ The Court stated that "the power granted to Congress to raise armies was susceptible of narrowing the area over which the militia clause operated." *Selective Draft Law Cases*, 245 U.S. at 384. Congress' power in the "army sphere" was plenary and complete under the Constitution. *Id.* at 382. The exercise of the army power was "wisely left to depend upon the discretion of Congress." *Id.* at 383. Control of the militia was left to the states only "to the extent that such control was not taken away by the exercise by Congress of its power to raise armies." *Id.*

The majority continues its misreading, claiming that Congress' militia clause powers were created to "diminish" the use of the army power "to those situations in which such vast power was *strictly necessary*." Maj. op. at 29. The majority suggests that the militia powers "diminish" the power of

⁶ The Supreme Court's reliance on the power "to declare war" as one of the clauses giving Congress authority to pass the statute challenged by the *Selective Draft Law Cases*, 245 U.S. at 377, yielded a narrow holding of the power to enact compulsory military service. Congress' authority to compel registration and draft in circumstances short of a declared war has been since upheld. See *United States v. O'Brien*, *supra*; *United States v. Crocker*, 420 F.2d 309 (8th Cir. 1970).

Congress to raise armies; in fact, the Supreme Court stated that the militia powers "diminished the occasion" for use of the army power. *Selective Draft Law Cases*, 245 U.S. at 383. The Court did not intimate that Congress' possession of power over the militia in any way fettered Congress' power to raise armies; "[t]he latter power when exerted was * * * complete to the extent of its exertion and dominant." *Id.* at 383. The Court concluded that Congress' power to raise armies was limited "only as in the discretion of Congress it was deemed the public interest required * * *." *Id.* at 383-84.

I find in the *Selective Draft Law Cases* no basis for the majority's conclusion that an express declaration of a national security emergency must precede Congress' exercise of its power to raise armies.

IV. THE FRAMERS' INTENT

From its survey of the drafters' and ratifiers' debates, the majority concludes that the Framers, motivated by a fear of standing armies, intended that the United States look to the militia as the principal military force for the nation's defense and as an essential check on federal military tyranny. The majority also concludes that, consistent with these purposes, the militia clause must limit the assertions of congressional authority under the army clause.

The militia clauses spell out the circumstances in which Congress can call out the militia (clause 15), and divide authority for governance of the militia between the central government and the states (clause 16). The majority errs in reading these limitations on Congress' power over the militia as necessarily limiting Congress' exercise of the army power. The Constitution granted Congress power over the militia and the army to provide for the common defense. Powers over the militia reserved to the states should be interpreted consistently with that purpose.

A. Authority for the Common Defense

The majority opinion properly notes that correcting the obvious shortcomings of the Articles of Confederation was foremost among the Framers' objectives in drafting provisions concerning the common defense.⁷ The majority errs, however, in asserting that the Constitution intends that principal reliance for the national defense be placed upon the state militias. Maj. op. at 6-7.

During the Framers' debates,⁸ some delegates speculated that the militia could prove to be a military force sufficient to meet the immediate defensive needs of the United States.⁹ But

⁷ See also *Selective Draft Law Cases*, 245 U.S. at 306.

⁸ In the search for originalist interpretations of constitutional intent, a cautionary note is found in Madison's views, expressed in correspondence, that "a knowledge of the controversial part of the proceedings of its framers [should] be turned to no improper account As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character." Quoted in J. Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 936. Madison also cautioned against uncritical use of *The Federalist* because "it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates." *Id.* As an advocate, Madison ably shifted the emphasis of his own arguments as warranted by the tenor of the debates in the Constitutional Convention, *The Federalist*, and the Virginia ratification convention.

⁹ The contrary view was also in evidence, however. At the Constitutional Convention, Mr. Pinkney of South Carolina expressed "but a scanty faith in Militia," opining that "there must be also a real military force." II Farrand, 332. In the ratification debate in the Virginia House of Delegates, H. Lee spoke from his soldiering experience in the War of Independence, defending the constitutional commitment of the army power to the central government: "I have seen proof of the wisdom of that paper on your table. I have seen incontrovertible evidence that the militia cannot always be relied on." 5 J. Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution*, 178 (1801). See also *The Federalist* No. 25 at 106 (A. Hamilton) (reliance on the militia "had like to have lost us our independence").

Congress' authority to raise, support, and regulate land and naval forces was not predicated on a first resort to the militia. The debates reflect the delegates' general distrust of standing armies. The delegates "hoped there would be no standing army in time of peace," unless a small one.¹⁰ Yet their hopes and fears did not blind them to the possibility that "a standing force of some sort may, for ought we know, become unavoidable."¹¹ Indeed, a motion to fix a numerical limit on the size of the army in peacetime was unanimously rejected.¹² The Convention reached an agreement on the basic powers of Congress to provide for the public defense before they proceeded to debate Congress' power to call forth the militia.¹³ Clearly, the Constitution commits provision for the common defense principally to the national government. Furthermore, the Constitution permits Congress discretion to rely on the powers in Congress' exclusive possession.

B. The Fear of Standing Armies

It requires a strained reading of the Framers' debates to conclude that the delegates who viewed primary state control of the militia as an essential check to federal military tyranny carried the day. Several structural provisions addressed the

¹⁰ II Farrand 326 (G. Mason).

¹¹ II Farrand 330 (J. Dayton).

¹² *Id.* at 330.

¹³ See McHenry's concise summary of the Convention's progress on August 18:

To make war, to raise armies[,] to build and equip fleets, amended to 'declare war, to raise and support armies, to provide and maintain fleets' to which was added 'to make rules for the government and regulation of the land and naval forces.[']

The next clause [to call forth the aid of the militia] postponed. II Farrand 333.

Framers' particular objections to standing armies¹⁴ while vesting Congress with the discretion to raise armies when necessary for the common defense. The principles underlying these provisions—plenary authority in the central government, Congress' power of the purse, and the subordination of the military establishment to civilian control—retain their vitality today.

In James Madison's view, "the best possible precaution against danger from standing armies" was the "effectual establishment of the Union."¹⁵ Without a strong central government, states left to their own devices could be picked off singly by outside enemies; if a state's government was usurped by an ambitious faction, jealousy might lead to armed conflict between the states themselves.¹⁶

¹⁴ Madison noted, at the Virginia convention, that the American people complained about the King's quartering of standing armies "because it was done without the local authority of this country—without the consent of the people of America." 5 Elliot at 413 (J. Madison). See *The Declaration of Independence*, para. 13-14. The need for structural restraints on standing armies was rooted in the American (and English) experience with military forces unrestrained by popular civil government. B. Bailyn, *The Ideological Origins of the American Revolution*, 61-65 (1967).

¹⁵ *The Federalist* No. 41 at 258-59 (J. Madison). The authors wrote at length against the perils of disunion. *Id.*, No. 3-5 (J. Jay); Nos. 6-9 (A. Hamilton).

¹⁶ The majority cites Madison's famous essay on controlling the effects of faction in support of the claim that reserved state authority was meant to check "ill-considered political reactions" by the Congress. *Maj. op.* at 22. In fact, Madison touted the advantages of the larger federal republic over the States in rising above "local prejudices" that might lead men to sacrifice the public interest to "temporary or partial considerations." *Id.*, No. 10 at 82-84.

The better check on "surreptitious" attempts to elude statutory restraints on the use of the Guard lies not with the Governors, *Maj. op.* at 61-62, but with the Congress.

The two-year limitation on appropriations for the army, modeled on Parliament's practice of controlling the purse strings for the King's army, was an additional precaution.¹⁷ The requirement obliged congressional deliberation on the propriety of maintaining a standing military force, and was meant to forestall improvident vesting "in the executive department [of] permanent funds for support of an army."¹⁸

A third check was the republican structure of the new government. As explained by Alexander Hamilton, putting "the whole power * * * in the hands of the representatives of the people" creates an obstacle to the potential usurpation of power by the military establishment.¹⁹

A further check to the danger of standing armies was "the effectual provision for a good militia."²⁰ If the militia was "well-regulated" and disciplined, there would be less need for Congress to maintain a standing army in peacetime. The Constitution provided for a militia, subject to congressional call, primarily as an alternative to a national army, and not, as the majority contends, as a state force to be marshalled in opposition to the federal government.

The majority misreads Alexander Hamilton's explication of the army and militia powers. Hamilton wrote *The Federal-*

¹⁷ *Id.*, No. 41 at 259-60 (J. Madison). See also II Farrand 330 (H. Williamson) (limiting appropriation of revenue was the best guard against danger of a standing army); 5 Elliot at 393-94 (J. Madison) (Constitution puts "the purse * * * in the hands of the representatives of the people").

¹⁸ *The Federalist* No. 26 at 171 (A. Hamilton).

¹⁹ *The Federalist* No. 28 at 180 (A. Hamilton); *Id.*, No. 24 at 158 (A. Hamilton). See also 5 Elliot at 420 (J. Marshall) ("[A]s the government was drawn from the people, the feelings and interests of the people would be attended to, and * * * we should be safe in granting them power to regulate the militia").

²⁰ II Farrand at 386 (J. Madison). See also 5 Elliot at 381 (J. Madison).

ist No. 23 as a justification of congressional discretion in the plenary exercise of those "authorities essential to the care of the common defense."²¹ The majority finds this patent interpretation directly contradicted by Hamilton's discussion of the militia power in *The Federalist* No. 29, and proceeds to "harmonize" the two essays in a manner that supports the rule that the army power can only supersede the states' reserved militia power in exigent circumstances. Maj. op. at 20-21.

The majority writes that "Hamilton, in *The Federalist* No. 29 (along with Madison in *The Federalist* No. 46) declared that an essential purpose behind the states' reserved authority over the militia was to guard against the dangers of the federal army." Maj. op. at 19. On the contrary, Hamilton is writing to justify congressional authority over the militia, not the states' reserved authority: the check against standing armies comes from "an efficacious power over the militia in the same body" empowered to raise armies, i.e., the Congress.²²

²¹ *The Federalist* No. 23 at 153 (A. Hamilton) (quoted by Maj. op. at 18).

²² *The Federalist* No. 29 at 183 (emphasis added). Hamilton begins the essay by noting: "The power of regulating the militia and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defense and of watching over the internal peace of the Confederacy." *Id.* at 182. Hamilton wrote a series of essays (Nos. 23-29) to justify the convention's proposals to "empower the Union," and to take issue with ratification opponents' arguments that the military powers granted to Congress were excessive. I disagree with the majority's claim that omission of any reference to the militia in No. 23 is significant. Hamilton's personal sentiments about the relationship of the army and the militia may be found in his description of the army powers as "essential" to, and the militia powers as "incidents" of Congress' military power. Hamilton also described the militia as a "valuable and powerful auxiliary" force. *Id.*, No. 26 at 173-74 (emphasis added).

Hamilton does describe the militia as both a "substitute * * * for a standing army, and the best possible security against it, if it should exist." By claiming that this passage supports the view that states retain militia authority principally as a check on federal tyranny, however, the majority takes Hamilton's remarks out of context. When Hamilton poses this dual function of the militia (as substitute for, and security against, a standing army), he is delivering a "discourse" of his "sentiments to a member of the federal legislature on the subject of a militia establishment." Hamilton advises his hypothetical Congressman to establish "a select corps of moderate size," rather than attempt to discipline the whole body of the militia. Congressional provision for a select militia could avoid the inconvenience attendant to disciplining the whole militia, produce a well-trained defense force, and lessen the need for a standing army. A select militia—established, armed and disciplined according to Congress' "well-digested plan"—would constitute "a large body of citizens, little if at all inferior to * * * [the army] in discipline and the use of arms, who stand ready to defend their * * * rights." Consequently, even "if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people." As envisioned by Hamilton, it was not reserved state authority, but the prudent exercise of federal authority over the militia, that would protect citizens' liberties from the spectre of an oppressive federal army.²³

²³ *Id.*, No. 29 at 184-85. Nor does Madison, in No. 46, declare that state control of the militia is a principal check to federal military power. Madison dismissed the prospect of a federal military force deployed for "projects of ambition." That the people would let such a project come about "must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misjudged ex-

C. The Militia Powers

The traditional nature of the militia, as a force subject to state control for defense of the states, was presumed by most of the Framers. The burden of persuasion lay with the advocates of a vigorous federal government that the militia was "a National concern, and ought to be provided for in the National Constitution."²⁴ Yet, in spite of the dire warnings of delegates opposed to federal control over the militia,²⁵ the

aggravations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism." Even if such an "extravagant" supposition were made, Madison doubted whether a militia "of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence" could be conquered by regular troops. *Id.*, No. 46 at 298-99.

Madison and Hamilton's discussion of their opponents' exaggerated suppositions should not obscure their principal point: citizens would see to it that their representatives in the federal government would exercise prudence and discretion in military affairs. Only in the unlikely event of the complete corruption or collapse of civil government would the military establishment be turned against the people.

²⁴ II Farrand 387 (J. Madison). The subject of regulating the militia was introduced to the Convention as a "power necessary . . . to the General Government." *Id.* at 326 (J. Mason). A number of delegates advocated full national control over the militia. *Id.* at 331, 386 (J. Langdon); *Id.* at 331 (J. Butler); *Id.* at 332 (J. Pinkney).

²⁵ Maryland's Luther Martin "was confident that the States would never give up the power over the Militia." *Id.* at 387. Elbridge Gerry of Massachusetts warned that giving the general government power over the militia was inconsistent with the states' continued existence. *Id.* at 388. The convention's "compromise" apparently failed to mollify Martin or Gerry, as they both opposed ratification at their respective state conventions. George Mason, who the majority identifies as a leader in the search for a compromise Maj. op. at 10, also argued against ratification at the Virginia convention. 5 Elliot at 378ff.

Constitution authorized substantial federal power to organize and call forth the militia.

The majority represents the language of clause 16, providing for the regulation of the militia, as a "workable compromise" crafted by committee, and meant to satisfy both federalists seeking national control over the militia and "states' rights delegates" intent on preserving sufficient state "authority to check the potential abuse of military power by the federal government." Maj. op. at 10.²⁶ Given my view, already expressed, that Congress may legitimately train the NGUS as a reserve component of the Armed Forces of the United States, the precise contours of respective state and federal authority over the militia (now the state National Guards) is of no moment in weighing the constitutionality of the Montgomery Amendment. This is so because, whatever authority is expressly or impliedly reserved to the states in the militia clause, the separate and superior federal power to raise armies is still paramount. *Cox v. Wood*, 247 U.S. at 6.

²⁶ The Amici States find in the Committee's compromise language "conclusive evidence" of the states' exclusive sphere of control over training the militia. Amici States' Br. at 5. I am not persuaded that the debate over the Committee's resolution, subject to divergent parsings and numerous proposed amendments after it was reported back to the Convention, necessarily contained "apt, precise, definite expressions" of the Framers' intent. I am more of a mind with Cong. Abraham "oldwin, who opined in the House of Representatives in 1796 while debating the Treaty making powers, that

"it was not supposed by the makers of [the Constitution] at the time, but that some subjects were left a little ambiguous and uncertain. . . . He believed this subject . . . of the Militia . . . was one of them."

III Farrand 369-70. The Convention voted down four attempts to amend or substitute, and a motion to recommit, the Committee's proposal; and Sherman's motion to delete the militia training clause was withdrawn. *Id.* at 385-86, 388, 617.

The supremacy of the federal army power is all the more apparent when the purpose of the militia clause is considered.

The majority's gloss of the militia clause obscures another articulated reason why the states wanted to preserve a measure of authority in organizing the militia: "not because of a fear of national control, but because the states might need to use the militia for their own purposes."²⁷ The division of authority over the militia in clause 16 is consistent with this purpose. A militia officered and trained by the states, and governed by the states when not in federal service, is available to answer the states' need for a civil defense force. This interest, and not state sovereignty in the abstract, or the state's power to resist military tyranny, gives meaning today to the militia clause reservations. Appellants claim that the states have a legitimate interest under the militia clause that would be "rendered meaningless and unprotected if the militia can be transformed without gubernatorial consent at any time during peacetime for an indefinite period into a federal entity solely for the purpose of peacetime training." App. Reply Br. at 9. Yet, appellants offer no concrete particulars of how the states' integrity might be compromised by federal active duty training. The Montgomery Amendment gives rein to the state's legitimate interest in using the militia to restore or maintain public order, because it still delegates to the governor the authority to block active duty training "if he or she thinks the Guardsmen are needed at home for local emergencies."²⁸

²⁷ Malbin, *Conscription, The Constitution, and The Framers: An Historical Analysis*, 40 Fordham L. Rev. 805, 824 n.69. Malbin generally offers a corrective to the analysis of the Convention advanced by Friedman (cited by Maj. op. at 7 n.2).

II Farrand 331 (O. Ellsworth); *Id.* at 331, 332, 388 (R. Sherman); *Id.* at 330-31 (J. Mason); *Id.* at 331 (J. Dickinson); *Id.* at 391 (J. Wilson).

²⁸ S. Rep. No. 331, 99th Cong., 2d Sess. 475 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 6534.

So long as Congress' provision for ordering the National Guard to active duty in federal status does not impair the states' ability to keep up or deploy the militia in furtherance of the states' interest, the Constitution's reservation of state authority is not offended.

V. CONCLUSION

Congress' constitutional authority to govern the National Guard as a component of the Armed Forces of the United States does not depend on the concurrence of the states. Nor does the constitution mandate that an express declaration of a national security emergency must precede any particular deployment for training of the reserves. Therefore, I would affirm the order of the district court granting the Department of Defense's motion for summary judgment.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals,
Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-87 CIV 54

RUDY PERPICH, Governor of the State of Minnesota,
and the STATE OF MINNESOTA, by its Attorney
General, Hubert H. Humphrey, III,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE;
UNITED STATES DEPARTMENT OF THE AIR
FORCE; UNITED STATES DEPARTMENT OF THE

ARMY; NATIONAL GUARD BUREAU; CASPAR W. WEINBERGER, Secretary of Defense; JOHN O. MARSH, JR., Secretary of the Army; EDWARD C. ALDRIDGE, Secretary of the Air Force, and LIEUTENANT GENERAL HERBERT R. TEMPLE, JR., Chief, National Guard Bureau,
Defendants.

MEMORANDUM ORDER

Richard K. Willard, Assistant Attorney General and Jerome G. Arnold, United States Attorney, by VINCENT M. GARVEY, LESLIE K. SHEDLIN, Washington, D.C. and JOHN LEE, Minneapolis, Minnesota, appeared for defendants.

Hubert H. Humphrey, III, Attorney General for the State of Minnesota by JOHN R. TUNHEIM and PETER M. ACKERBERG, St. Paul, Minnesota, appeared for plaintiffs.

This matter came before the court on June 15, 1987, upon motions brought by both sides to the lawsuit. Defendants move for a dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Because defendants submitted materials outside the pleadings, the court shall treat this motion as one for summary judgment. Fed. R. Civ. P. 12(b). For their part, plaintiffs move the court for summary judgment in their favor. Both parties agree that there exist for resolution no disputed issues of fact, and this matter is ripe for summary judgment.

The court reiterates its gratitude to the parties, amici, and their counsel for the able and helpful manner in which they have prepared and submitted this case.

STATUTORY BACKGROUND

Broadly stated, the issue before the court in this action is the status of the National Guard under the United States Constitution. The term "National Guard" refers to two overlapping, but legally distinct, organizations. Congress, under its constitutional authority to "raise and support armies" has created the National Guard of the United States, a federal organization comprised of state national guard units and their members.¹ These state units also maintain an identity as state national guards, part of the militia described in Article I, Section 8 of the Constitution.

Congress has regulated the National Guard under provisions found in Titles 10 and 32 of the United States Code. The provisions in Title 10 relevant to the National Guard deal exclusively with the National Guard of the United States, a ready reserve component of the Army and Air Force. Sections 672 (b) and (d) of Title 10 pertain to the active duty of units or members of the National Guard of the United States:

672. Reserve components generally

* * * * *

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under

¹ See H.R. Rep. No. 141, 73rd Cong., 1st Sess. 2-5 (1933); *Weiner, The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 208, 208 n. 153 (1940).

this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

* * * * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

* * * * *

In 1985 and 1986, several governors either withheld their consent under the provisions of §§ 672(b) and 672(d) and objected to the active duty deployment of National Guard personnel to Central America or indicated their intention to do so. See 132 Cong. Rec. H6264-H6268 (daily ed. Aug. 14, 1986). In response to these actions, Congress enacted an amendment offered by Representative Montgomery which precludes governors from withholding their consent under §§ 672(b) and 672(d) because of objections to location, purpose, type, or schedule of the active duty.²

² 10 U.S.C. § 672(f):

The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

UNDISPUTED FACTS

Pursuant to §§ 672(b) or 672(d) of Title 10, United States Code, defendants ordered members of the Minnesota National Guard to active duty for training missions in Central America. These missions were conducted January 3-17, January 9-25, and January 22-26, 1987. Plaintiff Rudy Perpich, Governor of Minnesota, would not have consented to one of the training missions ordered by defendants in January 1987 but for the restrictions imposed by § 672(f). Plaintiffs expect the defendants will order members of the Minnesota unit of the National Guard to active duty for training purposes outside the United States in the future, and plaintiff Perpich intends to withhold consent to defendants' orders if he objects to the location, purpose, type, or schedule of such training.

DISCUSSION

Plaintiffs contend the Montgomery amendment offends the Militia clause of the Constitution³ by impermissibly impinging upon the states' "authority of training the militia." Plaintiffs argue that the Militia clause reserves to each state exclusive power over training of the National Guard,⁴ and this reserva-

³ Art. I, § 8:

The Congress shall have Power . . .

Cl. 15:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Cl. 16:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

⁴ "The National Guard is the modern Militia reserved to the states by Art. I, § 8, cl. 15, 16 of the Constitution." *Maryland v. United States*, 381 U.S. 41, 46 (1965) (citation omitted).

tion requires that Congress obtain gubernatorial consent to training during peace time. Plaintiffs further argue that neither the Army clause⁵ nor the Necessary and Proper clause⁶ negates the reservation of peace time training authority over the National Guard found in the Militia clause.

When ordered to active duty under § 672, defendants argue, the National Guard is "Employed in the Service of the United States." See Art. I, Sec. 8, cl. 16. In this status, defendants assert, the National Guard is governed by Congress' plenary power under the Army and Necessary and Proper clauses to provide for the national defense. Defendants contend that the reservation to the states of authority over training the guard simply does not come into play while the National Guard is employed in the service of the United States.

Although this action arises out of a dispute between the parties over the propriety of deploying elements of the Minnesota Unit of the National Guard to Central America for training purposes, the court emphasizes that the wisdom of that deployment is in no sense an issue in this case. Judgment as to the wisdom of this program lies exclusively within the purview of the political branches of government. This court must determine only whether Congress has the power to act as it has.

I. Historical Development of National Guard

An understanding of the historical development of the National Guard, particularly as it relates to the evolution of the Guard's dual status, is necessary to a resolution of the parties' dispute. From the time of the Constitution's ratification through the Spanish-American War, the militia, which became known as the National Guards in the latter half of the nine-

⁵ Art. I, § 8, cl. 12.

⁶ Art. I, § 8, cl. 18.

teenth century, was a loosely trained force best suited to drills and "showy parades in harlequin uniforms." See Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 191 (1940) (hereinafter "*The Militia Clause*"); *Federal Aid in Domestic Disturbances*, Sen. Doc. No. 263, 67th Cong., 2d Sess. 205 (1922). As in each previous conflict the nation experienced, the National Guards' performance in the Spanish-American War was unsatisfactory. Some units stood upon their constitutional rights and refused to serve outside the United States. *The Militia Clause*, *supra*, at 192. Because of inadequate and incompatible training, those units that did serve did so ineffectually. *Id.*

Dissatisfaction with the National Guards' performance in the Spanish-American War lead Congress in 1903 to enact the Dick Act, a program of financial grants to state National Guard units. Units receiving grants were required to conform to national standards, including the requirement for drill at least 24 times per year and attendance at a five day summer camp. *Id.* The National Defense Act of 1916 further expanded the federal government's involvement in the maintenance and training of the National Guard. In addition to reorganizing and expanding the Regular Army and creating an Officers Reserve Corps, the Act restructured the National Guard to enable it to serve as an integral component of the Army of the United States. This restructuring dramatically increased the scope of federal control over the guard by expanding federal financial support for Guard units, prescribing the qualifications of National Guard officers, and providing for their recognition by federal authorities only should they be found qualified. The 1916 Act also required every officer and enlisted man in the National Guard to take a dual oath to support the Nation as well as the State, and to obey not only the governor but also the president. *Id.* at 200-201.

In the years following World War I, the National Guard again was reconstituted. During this time, the nation was moving toward a "One Army" concept, under which the Regular Army and the various reserve and militia organizations were unified under the administration and command of The United States Army. *Id.* at 207. In time of peace, however, the National Guard was not yet a part of the Army: "the Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers Reserve Corps and the Enlisted Reserve Corps." National Defense Act, § 1, as amended in 1920, 41 Stat. 759 (1920); *The Militia Clause, supra*, at 207.

In 1933, Congress amended the National Defense Act to create the National Guard of the United States as a reserve component of the Army of the United States. Act of June 15, 1933, 48 Stat. 153, 155. In this capacity, the National Guard of the United States was organized and was to be administered under the Army Clause. *The Militia Clause, supra*, at 208; see H.R. Rep. No. 141, 73rd Cong., 1st Sess. 2-5 (1933). In the Armed Forces Reserve Act of 1952, Congress enacted forerunners of the current gubernatorial consent provisions of 10 U.S.C. §§ 672(b) and 672(d). Act of July 9, 1952, ch. 608, §§ 233(c) and 233(d), 66 Stat. 481, 490. Congress enacted these provisions in response to objections from state National Guard officials who sought to limit the scope of the federalization of the National Guard in part on constitutional grounds. *Armed Forces Reserve Act: Hearings on H.R. 5426 Before the Senate Subcommittee on Armed Services*, 82nd Cong., 2nd Sess., 127, 246, 310, 312 (1952). Following the Armed Forces Reserve Act of 1952, no further changes relevant to this action

were made in the legal status of the National Guard until the enactment of the Montgomery amendment in 1986.

The Guard's status as a reserve component of the United States armed forces, however, continued to evolve. Today, as a part of the nation's Total Force military capability, 18 of the 24 Total Army divisions available in the event of war would be provided in whole or in part by the Army National Guard. Similarly, the Air National Guard provides 73 percent of the nation's air defense interceptor forces, 52 percent of tactical air reconnaissance, 34 percent of tactical airlift, 25 percent of tactical fighters, 17 percent of aerial refueling, 13 percent of air rescue and recovery forces, 14 percent of special operations forces, and 24 percent of tactical air support forces. *Declaration of James H. Webb, Jr., Attached Statement at 1.* Thus the National Guard has assumed a significant role in the nation's military readiness program.

II. Analysis

All authority to provide for the national defense resides in Congress, and state governors have never had, and never could have jurisdiction in this area. *The Selective Draft Law Cases*, 245 U.S. 366, 383 (1918); *Houston v. Moore*, 5 Wheat. 1, 16 (1820). For example, Article I, Section 10, Clause 3 of the Constitution prohibits states from keeping troops or ships of war in time of peace and from engaging in war, unless actually invaded. In addition, the Militia clause has not been read to restrict Congress' plenary authority to provide for the national defense. *The Selective Draft Law Cases*, 245 U.S. at 383.

Congress' establishment of the dual enlistment system, under which National Guard members serve as members of both a state national guard and of the National Guard of the United States, is a valid exercise of Congressional power

under the Army and Necessary and Proper clauses. *Johnson v. Powell*, 414 F.2d 1060, 1063-64 (5th Cir. 1969); *Drifka v. Brainaird*, 294 F.Supp. 425, 428 (W.D. Wash. 1968); see H.R. Rep. No. 141, 73rd Cong., 1st Sess. 2-5 (1933). Thus an authority designated by the Secretary of Defense or the Secretary of a military department may call National Guard units and members to active duty under § 672(b) and 672(d) and the Militia clause does not inhibit this power. See *The Selective Draft Law Cases*, 245 U.S. at 383; *Johnson*, 414 F.2d at 1064. Because Congress' authority to provide for the National defense is plenary, the Militia clause also cannot constrain Congress' authority to train the Guard as it sees fit when the Guard is called to active federal service.⁷

As the Militia clause does not restrain Congress' authority to train the National Guard while the Guard is in active federal service, the gubernatorial veto found in §§ 672(b) and 676(d) is not constitutionally required. Having created the gubernatorial veto as an accommodation to the states, rather than pursuant to a constitutional mandate, the Congress may withdraw the veto without violating the Constitution.

Plaintiffs draw the court's attention to the debate and negotiations over the Militia clause at the Constitutional Convention. Plaintiffs argue that the course of this debate evinces an intent on the part of the framers of the Constitution to preserve in the states what Alexander Hamilton described as a "preponderating influence" over the militia. *Federalist No. 29* (Mentor ed.) at 186. Preservation of this local influence, effectuated by reserving to the states authority

⁷ See also Art. I, § 8 cl. 16 ("The Congress shall have Power . . . To provide . . . for governing such part of [the militia] as may be employed in the service of the United States").

over training and appointment of officers, served as a check upon the power of the federal government. In particular, the sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured by a militia comprised of men who were civilians primarily, soldiers on occasion. *United States v. Miller*, 307 U.S. 174, 179 (1939).

The proposition that the Congress may train the National Guard while the Guard is employed in the service of the United States is not inconsistent with the concerns voiced at the Constitutional Convention. Indeed, the states retain shared control over the training of the Guard while it is not on active federal duty. The states relinquish this authority, and its attending influence, only when Congress calls the National Guard to federal duty pursuant to its authority under the Army and Necessary and Proper clauses. When Congress so acts, the language of the militia clause is relevant only insofar as its provision granting Congress authority "for governing such part of [the militia] as may be employed in the service of the United States," makes it clear that the reservation to the states of the appointment of officers and the authority of training does not restrict the authority of Congress to govern the National Guard while it is in federal service.⁸

Plaintiffs further contend the court should recognize that the Militia clause reserves to the states authority over training the National Guard in time of peace, and restricts Congress'

⁸ In addition, utilization of the National Guard as a reserve component of the nation's Total Force military capability reduces the need for a large standing army. Reading the Constitution to permit Congress to train the Guard effectively for this mission therefore is consistent with the framers' intent to avoid the establishment of such an army.

training authority to war time. There is no basis for this distinction in the language of the Constitution. Instead, the relevant dichotomy in the constitutional language is between federal service and state service. See Article I, sec. 8, cl. 16 ("The Congress shall have Power . . . To provide . . . for governing such Part of [the militia] as may be employed in the Service of the United States. . . ."). Viewing the reservation to the states of authority over training the militia in light of this dichotomy harmonizes the Army and Militia clauses, and gives each its proper significance. See, e.g., *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975) (the various provisions of the Constitution are to be construed harmoniously with the states' reserved powers).⁹ Thus the court concludes that Congress may exercise plenary authority over the training of the National Guard while the Guard is on active federal duty, and must share with the states authority over training of the Guard only while the Guard is not "employed in the Service of the United States." Under this analysis, Congress acted

⁹ The position taken by Amici Curiae National Guard Association of the United States, in support of defendants' motion for summary judgment, is inconsistent with this analysis. Amici argue that the Militia clause provision reserving to the states the "Authority of training the Militia according to the discipline prescribed by Congress" (emphasis added), gives the Congress unrestricted authority over training the National Guard, whatever its status. Under this view, the Congress apparently could order the National Guard to training exercises outside the United States even without calling the Guard to active federal duty pursuant to statute. Until the Congress calls the National Guard to active federal duty, however, it lacks the plenary authority provided by the Army and Necessary and Proper clauses, and instead must share authority over training with the states. This necessity of shared authority over training the National Guard when it is not employed in the service of the United States would preclude Congress from exercising the sort of unrestricted control over the National Guard the defendant Amici envision.

within its authority in providing for the active duty training of the Minnesota National Guard in Central America without plaintiff Perpich's consent, and plaintiffs' challenge to the Montgomery amendment's constitutionality must fail.

Based upon the foregoing, the arguments and submissions of the parties, and the record as presently constituted,

IT IS ORDERED That plaintiffs' motion for summary judgment be and the same hereby is respectfully denied.

IT IS FURTHER ORDERED That defendants' motion for summary judgment be and the same hereby is granted.

IT IS FINALLY ORDERED That the Clerk enter judgment as follows:

IT IS ORDERED, ADJUDGED, AND DECREED
That plaintiffs' action be and the same hereby is dismissed with prejudice.

Dated: August 3, 1987.

DONALD D. ALSOP

Chief U. S. District Judge

(3)
No. 89-542

Supreme Court, U.S.
FILED

NOV 29 1989

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

**RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL.,
PETITIONERS**

v.

DEPARTMENT OF DEFENSE, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
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STUART M. GERSON
Assistant Attorney General
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QUESTION PRESENTED

Whether the Montgomery Amendment, 10 U.S.C. 672(f), which prohibits a State's governor from withholding consent to a National Guard unit's being ordered to active duty outside the United States on the ground that the governor objects to the location, purpose, type, or schedule of that duty, is a constitutional exercise of Congress's power under the Army Clause, U.S. Const. Art. I, § 8, Cl. 12.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-542

RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL.,
PETITIONERS

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A62) is reported at 880 F.2d 11. The opinion of the panel (Pet. App. A63-A141), which was vacated by the court of appeals en banc (Pet. App. A62.1), is unreported. The opinion of the district court (Pet. App. A141-A153) is reported at 666 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1989. The petition for a writ of certiorari was

filed on September 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1933, Congress established the "dual-enlistment system" for the National Guard. Under this system, each National Guardsman enlists simultaneously in two distinct organizations: (i) the Army or Air National Guard of a particular State, each of which is a part of the organized militia of that State (see 32 U.S.C. 101(3)-(4), 101(6), 304) and (ii) the Army or Air National Guard of the United States, each of which is a reserve component of the national armed forces (see 10 U.S.C. 101(11), 261, 3261, 8261; 32 U.S.C. 101(5) and (7)).¹ The National Guard of the United States (NGUS) is a wholly federal organization; when serving on active duty, NGUS personnel are relieved from duty in their respective state National Guards. 32 U.S.C. 325.

Congress has prescribed the situations in which members of the NGUS may be ordered to active duty. *E.g.*, 10 U.S.C. 672-675. For instance, in the event of a war or a national emergency declared by Congress, federal authorities may order any NGUS unit to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. 10 U.S.C. 672(a).

This case involves units ordered to active duty under 10 U.S.C. 672(b) and (d). Under 10 U.S.C. 672(b), a unit of the NGUS may be ordered to active duty for any purpose, with the consent of the governor of the State from

¹ The history that led up to the adoption of this system is summarized in Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

which that unit comes, for up to 15 days a year.² Under 10 U.S.C. 672(d), any member of the NGUS may be ordered to active duty indefinitely, with his consent and the consent of the governor of the State of whose National Guard he is a member.³

In 1986, after several governors expressed opposition to the Administration's Central American policy and indicated that they would withhold their consent to NGUS training missions in that region, Congress enacted the Montgomery Amendment, 10 U.S.C. 672(f). This provision prohibits a governor from withholding consent to an NGUS unit's active duty outside the United States because of any objection to the location, purpose, type or schedule of that duty (10 U.S.C. 672(f)):

² Section 672(b) provides:

At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory or Puerto Rico or the commanding general of the District of Columbia National Guard, as the case may be.

³ Section 672(d) provides:

At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, or the District of Columbia, whichever is concerned.

The consent of a Governor described in subsections (b) and (d) [of 10 U.S.C. 672] may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

2. Petitioners, the State of Minnesota and its governor, Rudy Perpich, commenced this action after the Secretary of Defense ordered NGUS units from Minnesota to active duty for three training missions in Central America. Pet. App. A3-A4. The complaint sought a declaratory judgment that the Montgomery Amendment violates the Militia Clause, U.S. Const. Art. I, § 8, Cl. 16; in addition to specifying Congress's powers with respect to state militias, that clause "reserv[es] to the States * * * the Authority of training the Militia according to the discipline prescribed by Congress." Pet. App. A4.⁴ Petitioners also sought an injunction prohibiting federal authorities from ordering any unit of the Minnesota National Guard to active duty for training abroad without Governor Perpich's consent. *Ibid.*

The district court granted summary judgment for the federal government. Pet. App. A141-A153. The court found that the dual enlistment system is "a valid exercise of Congressional power under the Army and Necessary and

⁴ The Militia Clause, a term customarily used to describe two related enumerated powers, confers authority on Congress (U.S. Const. I, § 8, Cls. 15-16):

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

Proper clauses" of the Constitution, U.S. Const. Art. I, § 8, Cls. 12, 18, and that the Militia Clause "does not inhibit this power." Pet. App. A149-A150.⁵ "Because Congress' authority to provide for the National defense is plenary," the court continued, "the Militia clause also cannot constrain Congress' authority to train the Guard as it sees fit when the Guard is called to active federal service," "the gubernatorial veto found in §§ 672(b) and 672(d) is not constitutionally required," and "Congress may withdraw the veto without violating the Constitution." *Id.* at A150. The district court concluded that "Congress acted within its authority in providing for the active duty training of the Minnesota National Guard in Central America without plaintiff Perpich's consent, and plaintiffs' challenge to the Montgomery amendment's constitutionality must fail." *Id.* at A152-A153.

4. A divided panel of the court of appeals reversed. Pet. App. A63-A141. The majority of the panel—Judge Heaney and Senior Judge Fairchild, sitting by designation—held that the Montgomery Amendment "contravenes the intent of the Framers" and "violates the plain language" of the Militia Clause by encroaching upon the States' reserved power to train the militia. *Id.* at A66. The majority also ruled that the Montgomery Amendment is at odds with this Court's decisions in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox v. Wood*, 247 U.S. 3 (1918); the majority read those decisions to establish that "the army power could supersede reserved state authority over the militia only when Congress had determined that there was some sort of exigency or extraordinary need to

⁵ The Army Clause gives Congress the power

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years[.]

exert federal power." Pet. App. A92. Judge Magill dissented. *Id.* at A123-A141.

5. Acting en banc, the court of appeals granted rehearing, vacated the panel's decision, and affirmed the district court's decision. Pet. App. A1-A62.1. The majority of the court described the issue presented by the parties' positions as follows: "when the State claims a right to control Militia training, and Congress claims 'We're training the Army, not the Militia,' who wins?" *Id.* at A9. It resolved that question in favor of federal authority, noting that "[t]he authority given to Congress by the army clause is plenary and exclusive." *Ibid.* Like the district court, the majority of the court of appeals determined that the dual-enlistment system—and the authority conferred on federal officials to order NGUS units to active duty for training—were valid exercises of Congress's power under the Army Clause. *Id.* at A9-A10. The majority also noted that, in the *Selective Draft Law Cases*, *supra*, this Court "made clear that the army clause is not limited by the militia clause." Pet. App. A11. The majority concluded (*id.* at A13):

Congress' army power is plenary and exclusive. The reservation to the States of authority to train the Militia does not conflict with Congress' authority to raise armies for the common defense and to control the training of federal reserve forces. The Montgomery Amendment is a constitutional exercise of Congress' army powers.

Judges Heaney and McMillian dissented. The dissenting opinion adhered to the views expressed in the panel majority opinion. Pet. App. A14-A62.

ARGUMENT

The court of appeals' decision is consistent with a recent First Circuit decision that upheld the Montgomery Amendment in the face of a constitutional challenge indistinguishable from petitioners'. *Dukakis v. United States Dep't of Defense*, 859 F.2d 1066 (1st Cir.) (per curiam), aff'g 686 F. Supp. 30 (D. Mass. 1988), cert. denied, 109 S. Ct. 1743 (1989). No other court has reached a different conclusion. This Court denied certiorari in *Dukakis*, and there are no circumstances that would support a different disposition of this case.

As we demonstrated in our brief in opposition in *Dukakis*,⁶ and as both the First and Eighth Circuits have now held, the dual-enlistment system is a lawful exercise of Congress's authority under the Army Clause and the Necessary and Proper Clause. Moreover, in the *Selective Draft Law Cases*, *supra*, and *Cox v. Wood*, *supra*, which presented the question whether Congress could draft members of the state militias into the federal armed forces, this Court rejected the proposition on which petitioners rely here—that the Militia Clause limits Congress's plenary authority under the Army Clause. That resolution of the relationship between the Militia Clause and the Army Clause cannot fairly be limited to wars or other declared national "exigencies" (see Pet. 11-15), and it is dispositive of this case.⁷

⁶ We are providing petitioners' counsel with a copy of our brief in opposition in *Dukakis*.

⁷ In the *Selective Draft Law Cases*, 245 U.S. at 383, the Court stated that the authority that the Militia Clause reserves to the States "did not diminish the military power" conferred by the Army Clause or "curb the full potentiality of the right to exert it"; thus, notwithstanding the Militia Clause, Congress's power under the Army Clause is "complete to the extent of its exertion and dominant." Similarly, in *Cox v. Wood*,

Finally, even if it were not foreclosed by the Court's cases, the accommodation between the Militia Clause and the Army Clause that petitioners advocate would be untenable. Under petitioners' view, Congress could require units of the NGUS to fight a war abroad, a mission that is not among those for which the Militia Clause permits state militias to be used,⁸ but would lack the authority to prepare and train them abroad for such an eventuality. Nothing in the language or history of the Militia Clause justifies attributing that contradictory intention to the Framers.

247 U.S. at 6, the Court reiterated that Congress's powers to raise and support armies and to declare war "were not qualified or restricted by the provisions of the militia clause."

In reliance on these decisions, the Fifth Circuit held that units of state national guards could be ordered to active duty in the NGUS to serve abroad in Vietnam. *Johnson v. Powell*, 414 F.2d 1060 (1969).

⁸ Under the Militia Clause, U.S. Const. I, § 8, Cl. 15, the militia may be called forth only to "execute the Laws of the Union, suppress Insurrections and repel Invasions."

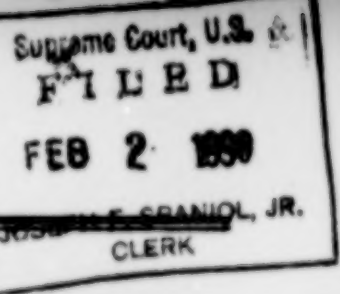
CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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NOVEMBER 1989

No. 89-542



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RUDY PERPICH, as Governor of The State of Minnesota,
and THE STATE OF MINNESOTA, by its Attorney
General Hubert H. Humphrey, III,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed September 26, 1989
- Certiorari Granted January 8, 1990

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Relevant Docket Entries	J.A. 1
*Complaint	J.A. 3
Declaration of James H. Webb, Jr., With Attachment	J.A. 9
Judgment of the United States Court of Appeals for the Eighth Circuit, dated December 6, 1988	J.A. 31
Judgment of the United States Court of Appeals for the Eighth Circuit, dated June 28, 1989	J.A. 31
<p>* A copy of the statutes in question attached to the complaint have been omitted. The relevant statutes appear in the ap- pendix to Petitioner's Brief.</p> <p>The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:</p>	
En Banc Opinion of the United States Court of Appeals for the Eighth Circuit, filed June 28, 1989	A-1 (Part I of the Petition)
Amended Order of the United States Court of Appeals for the Eighth Circuit vacating the court's opinion and judgment of December 6, 1988, dated January 11, 1989	A-62.1 (Part I)
Panel Opinion of the United States Court of Appeals for the Eighth Circuit, filed December 6, 1988	A-63 (Part II)
Memorandum Order of the United States District Court, District of Minnesota, Third Division, dated August 3, 1987	A-141 (Part II)

RELEVANT DOCKET ENTRIES

Perpich, et al. v. U.S. Department of Defense, et al.
U.S. District Court File No. CV-3-87-54

- 1-28-87 COMPLAINT—Summons Issued (10 pgs).
3-16-87 SUMMONS RETURNED, SERVED 1-28-87.
4-1-87 DEFTS. NO/MO TO DISMISS, Ret. before DDA on
6-15-87 at 10:00 a.m.
4-7-87 DECLARATION OF JAMES H. WEBB, JR., wi/att
exhibits.
4-16-87 PLTFF'S NO/MO FOR SUMMARY JUDGMENT,
Ret. before ——— on 6-15-87 at 10 a.m.
8-4-87 MEMORANDUM ORDER (DDA/8-4-87) that plttf's
motion for summary judgment is DENIED; Deft's motion
for summary judgment is GRANTED; that the Clerk enter
judgment as follows: IT IS ORDERED, ADJUDGED &
DECREED that plaintiffs' action be and the same hereby
is dismissed with prejudice. (counsel served by Judges
chambers).
8-10-87 PLAINTIFFS' NOTICE OF APPEAL TO THE
EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE
ALSOP'S ORDER AND JUDGMENT ENTERED 8-04-87.
8-14-87 TRANSCRIPT OF PROCEEDINGS (LPL) RE:
Motion held before DDA on 6-15-87 (separate).
7-24-89 CERTIFIED COPY OF THE OPINION FROM
THE EIGHTH CIRCUIT COURT OF APPEALS (McMil-
lian, Heaney, Arnold, Gibson, Fagg, Bowman, Wollman,
Magill and Beam-J; filed 6-28-89) that the decision of dis-
trict court is affirmed.
CERTIFIED COPY OF THE JUDGMENT FROM THE
EIGHTH CIRCUIT COURT OF APPEALS THAT: it is
ordered and adjudged that the judgment of the district

court in this cause be affirmed in accordance with the opinion of the Eighth Circuit Court. MANDATE ISSUED: 7-20-89.

United States Court of Appeals File No. 87-5345

1987

August 12 DOCKETED APPEAL.

1988

Feb. 9 ARGUED AND SUBMITTED TO JUDGES HEANEY, FAIRCHILD AND MAGILL IN ST. PAUL. John Tunheim, AAG, for the appellant, Deborah Kans, Justice, for the appellee. Rebuttal by Mr. Tunheim. RECORDED.

Dec. 6 OPINION BY HEANEY PUBLISHED. DISSENT BY MAGILL.

Dec. 6 JUDGMENT: Judgment of the district court is reversed and the cause remanded to the district court for proceedings consistent with the opinion of this Court.

Dec. 20 PETITION FOR REHEARING with suggestion for rehearing en banc filed by aplees. w/service.

1989

Jan. 11 ORDER: Appellee's petition for rehearing en banc has been considered by the Court and is granted. The Court's opinion & judgment of December 6, 1988 are hereby vacated. (Correcting Order).

June 28 OPINION BY MAGILL PUBLISHED. DISSENT BY HEANEY, JOINED BY McMILLIAN.

June 28 JUDGEMENT: After consideration, it is ordered and adjudged that the judgement of the district court in this cause be affirmed in accordance with the opinion of this Court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action File No. —

Rudy Perpich, Governor of the State of Minnesota,
and the State of Minnesota, by its Attorney General,
Hubert H. Humphrey, III,

Plaintiff,

v.

United States Department of Defense;
United States Department of the Air Force; United States
Department of the Army; National Guard Bureau; Caspar
W. Weinberger, Secretary of Defense; John O. Marsh, Jr.,
Secretary of the Army; Edward C. Aldridge, Secretary of
the Air Force, and Lieutenant General Herbert R. Temple, Jr.,
Chief, National Guard Bureau,

Defendants.

COMPLAINT

Plaintiffs, for their complaint herein, state and allege as follows:

NATURE OF THE ACTION

1. This is a civil action seeking: (1) injunctive relief against enforcement of any order by defendants commanding members of the Minnesota unit of the National Guard of the United States to active duty for training purposes outside the United States without plaintiff Perpich's consent; (2) injunctive relief against enforcement of Section 522 of the Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3871 (hereinafter "Section 522"); and (3) the judgment of this Court declaring that Section 522 is in violation of U.S. Const. art. I, § 8, cl. 16 (hereinafter "Militia Clause"). Section 522 modifies 10 U.S.C. §§ 672(b) and (d),

which provide that members and units of the Army National Guard of the United States and the Air National Guard of the United States may not be ordered to active duty without the consent of the appropriate state governor. Section 522 prohibits a state governor from withholding such consent to active duty outside the United States because of objection to the location, purpose, type or schedule of such active duty. (Copies of 10 U.S.C. § 672 and Section 522 are attached to this complaint.) The purpose of this action is to determine plaintiff Perpich's constitutional right to withhold consent to any order of defendants that commands members of the Minnesota units of the National Guard of the United States to train outside the United States in the absence of war, national emergency or other permissible condition.

JURISDICTION

2. This court has original jurisdiction of this action pursuant to 5 U.S.C. § 702 and 28 U.S.C. §§ 1331, 2201 and 2202.

PARTIES

3. Plaintiff Rudy Perpich is governor of the State of Minnesota and Commander in Chief of the state's military forces pursuant to Minn. Const. art. V, § 3, and Minn. Stat. § 190.02 (1986).

4. Plaintiff State of Minnesota has reserved to it the authority of training its militia pursuant to the Militia Clause.

5. Defendant United States Department of Defense is an agency and instrumentality of the United States and is headed by the Secretary of Defense pursuant to 10 U.S.C. § 133.

6. Defendant Department of the Air Force is an agency and instrumentality of the United States and is headed by the Secretary of the Air Force pursuant to 10 U.S.C. § 8012.

7. Defendant Department of the Army is an agency and instrumentality of the United States and is headed by the Secretary of the Army pursuant to 10 U.S.C. § 3012.

8. Defendant National Guard Bureau is a joint bureau of the Department of the Army and the Department of the Air Force and is the channel of communication between the departments concerned and the State of Minnesota on all matters pertaining to the National Guard and the National Guard of the United States pursuant to 10 U.S.C. § 3015.

9. Defendant Caspar W. Weinberger is Secretary of the Department of Defense and directs and controls the Department of the Air Force and the Department of the Army pursuant to 10 U.S.C. §§ 3010 and 8010.

10. Defendant Edward D. Aldridge is Secretary of the Air Force and is authorized to designate an authority to order members of the Air National Guard of the United States to active duty pursuant to 10 U.S.C. §§ 672(b) and (d).

11. Defendant John O. Marsh, Jr., is Secretary of the Army and is authorized to designate an authority to order members of the Army National Guard of the United States to active duty pursuant to 10 U.S.C. §§ 672(b) and (d).

12. Defendant Herbert R. Temple, Jr., is Chief of the National Guard Bureau.

COUNT I

13. The Militia Clause reserves to the states the authority to train the state militia.

14. The Minnesota National Guard is the organized militia of the State of Minnesota pursuant to Minn. Stat. § 192.01 (1986).

15. Members of the Minnesota National Guard are also members of either the Minnesota unit of the Air National Guard of the United States or the Minnesota unit of the Army National Guard of the United States (hereinafter collectively referred to as the "National Guard of the United States") pursuant to 32 U.S.C. § 101(4-7).

16. Defendants or their individual predecessors have ordered members of the Minnesota unit of the National Guard of the United States to active duty for training missions outside the United States pursuant to 10 U.S.C. § 672(b) or § 672(d).

17. Minnesota National Guard members were ordered by defendants to active duty for three 1987 training missions in Central America conducted January 3-17, January 9-25 and January 22-26.

18. The missions referred to in paragraph 16 and 17 have been for the purpose of training Minnesota National Guard members.

19. Plaintiff Perpich would not have consented to one training mission ordered by defendants in January, 1987, but for the restrictions imposed by Section 522.

20. Plaintiffs reasonably expect that defendants will order members of the Minnesota unit of the National Guard of the United States to active duty for training purposes outside the United States.

21. Plaintiff Perpich intends to withhold consent to defendants' orders commanding members of the Minnesota unit of the National Guard of the United States to train outside of the United States if he objects to the location, purpose, type or schedule of such training.

22. Section 522 purports to prohibit plaintiff Perpich from withholding consent to defendants' orders commanding members of the Minnesota unit of the National Guard of the United States to train outside of the United States because of objection to the location, purpose, type or schedule of such training.

23. Section 522 violates the Militia Clause by restricting the factors plaintiff Perpich may consider in deciding whether to withhold consent from defendants' orders commanding training outside the United States for members of the Minnesota unit of the National Guard of the United States.

24. Defendants' orders commanding members of the Minnesota unit of the National Guard of the United States to active duty for training outside the United States violates the Militia Clause in the absence of plaintiff Perpich's consent.

25. Plaintiffs will suffer irreparable injury if defendants are not enjoined from commanding members of the Minnesota unit of the National Guard of the United States to train outside the United States without plaintiffs' consent.

26. Plaintiffs will suffer irreparable injury if defendants are not enjoined from enforcing Section 522.

27. The short-term nature of training exercises ordered by defendants for members of the Minnesota unit of the National Guard of the United States precludes full litigation of their constitutionality prior to completion of any particular training exercise.

WHEREFORE, plaintiffs demand judgment against defendants and a decree of this Court as follows:

1. Permanently restraining and enjoining defendants, their employees, agents and servants and any and all other persons or parties acting in concert or participation with them from:

(a) Enforcing Section 522 in any manner, and

(b) Taking any action whatsoever for the purpose or effect of implementing any order of defendants commanding the Minnesota unit of the National Guard of the United States to active duty for training purposes outside the United States unless and until Governor of the State of Minnesota consents to their order.

2. Declaring Section 522 violative of the U.S. Constitution and, therefore, void and of no effect.

3. Granting such other, further, or different relief, whether legal or equitable, as this Court deems proper, together with

judgment against defendants for costs, disbursements, and reasonable attorney fees incurred on behalf of plaintiffs herein.

Dated: January 28, 1987

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

NO. CV 3-87-0054

RUDY PERPICH, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
DEFENSE, et al.,

Defendants.

DECLARATION OF JAMES H. WEBB, JR.

In accordance with 28 U.S.C. §1746, the following unsworn declaration is made pertaining to the above-captioned case.

1. I am the Assistant Secretary of Defense (Reserve Affairs).

2. The attached document is a true and exact copy of the prepared statement I presented to the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services on July 15, 1986.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of March 1987, at Arlington, Virginia.

JAMES H. WEBB, JR.

Assistant Secretary of Defense
(Reserve Affairs)

STATEMENT OF
ASSISTANT SECRETARY OF DEFENSE
(RESERVE AFFAIRS)

JAMES H. WEBB, JR.

HEARINGS BEFORE THE SUBCOMMITTEE
ON MANPOWER AND PERSONNEL
SENATE ARMED SERVICES COMMITTEE

July 15, 1986

FOR OFFICIAL USE ONLY UNTIL RELEASED BY THE
SUBCOMMITTEE

JAMES H. WEBB, JR.

ASSISTANT SECRETARY OF DEFENSE FOR
RESERVE AFFAIRS

Mr. James H. Webb, Jr., presently serves as the first Assistant Secretary of Defense for Reserve Affairs, following his confirmation by the Senate on April 27, 1984.

Mr. Webb was born on February 9, 1946, in St. Joseph, Missouri. In 1968 he graduated from the U.S. Naval Academy with a B.S. (Engineering) and was one of 18 in his graduating class of 841 to be awarded the Superintendent's letter of commendation for outstanding leadership contributions. Commissioned in the Marine Corps, he was the honor graduate of his class of 243 members at the Marine Officers Basic School. He served with the 1st Battalion, 5th Marine Regiment in Vietnam as a rifle platoon and company commander, earning the Navy Cross, the Silver Star, two Bronze Star medals for valor and two Purple Hearts.

Mr. Webb earned his J.D. from the Georgetown Law Center in 1975, winning the Horan award for excellence in legal writing. While a student, he wrote his first book, *Micronesia and U.S. Pacific Strategy*, and conducted a special twelve-week

study for the Governor of Guam on U.S. strategy in the Pacific and its effect on land issues in the Mariana Islands.

After graduation he wrote full-time until 1977, publishing *Fields of Fire* (1978), a novel of ground combat in Vietnam. The book was nominated for a Pulitzer Prize and was a finalist in the Hemingway competition for outstanding first novels.

In January 1979, he became the first "visiting writer" at the U.S. Naval Academy, where he taught literature and lectured frequently on leadership and the role of the military in the U.S. society. During this time he completed his third book, *A Sense of Honor* (1981), a novel about the Naval Academy set in 1968.

Mr. Webb served as both Assistant Minority Counsel and as the Minority Counsel for the House Veterans' Affairs Committee. His work included direct liaison with the Department of Defense, Veterans Administration, Health and Human Services, and the Department of Labor on budget, oversight and legislation regarding military veterans.

In July 1981, Mr. Webb left Congress to write *A Country Such as This* (1983), which was nominated for a Pulitzer Prize and the Pen/Faulkner award. In addition to his books, his military writing has included topics on service roles and missions, the draft, strategy and tactics, key manpower issues, and U.S.-Japanese defense obligations.

He has lectured on leadership at numerous military schools and colleges and has made extensive radio, TV, and newspaper appearances on the topics of military manpower, veterans issues, politics and the Vietnam War, Lebanon and Grenada. He received an Emmy award from the National Academy of Television Arts and Sciences for his coverage of the U.S. Marines in Beirut for the McNeil-Lehrer News Hour in 1983.

Mr. Webb received the 1979 American Legion National Commander's Public Relations Award and in 1976 was the first recipient of the Vietnam Veterans Civic Council's Outstanding Veteran Award. Mr. Webb, his wife, JoAnn, and their children, Amy, Jimmy, Sarah, and Julie, reside in Falls Church, Virginia.

(Rev. 1 Oct 85)

Mr. Chairman and members of the subcommittee:

I thank you for the opportunity to appear before the Committee today and present the views of the Department of Defense regarding the proposed legislation to clarify certain National Guard training authorities.

National Guard training is a subject of special importance, because the Army National Guard and Air National Guard have become major, fully integrated elements of our national deterrent strategy, our peacetime operational missions, and our Total Force war-fighting capability.

Today, the Army National Guard provides 46 percent of the combat units and 28 percent of the support forces of the Total Army. The force structure of the Total Army includes 10 divisions, 14 separate brigades, 2 special forces groups, 4 roundout brigades and 7 roundout battalions of the Army National Guard. In the event of a full mobilization, therefore, 18 of the 28 Army divisions would be provided wholly or in part by the Army National Guard.

The Air National Guard operates and maintains more than 1700 aircraft, organized in 24 wings and 67 groups. In Fiscal Year 1987, the Air National Guard will provide 73 percent of our air defense interceptor forces, 52 percent of tactical air reconnaissance, 34 percent of tactical airlift, 25 percent of tactical fighters, 17 percent of aerial refueling, 13 percent of

air rescue and recovery forces, 14 percent of special operations forces, 24 percent of tactical air support forces, and 4 percent of strategic airlift forces.

This formidable force is almost totally funded by the federal government. Excluding the value of equipment inventory, the federal government annually provides more than 90 percent of all National Guard funding. Since 1981, the Department of Defense and the Congress have invested nearly \$47 billion dollars in manning, equipping, and training the Army and Air National Guard.

The Total Force Concept of the early 1970's is a reality in 1986, so much so that contingency plans to counter aggression in both hemispheres cannot be effectively executed without committing National Guard and Reserve forces in the same time frame as active forces. We have increasingly staked our national security on the ability to mobilize, deploy, and employ combat ready National Guard and Reserve members and units anywhere in the world rapidly. Consequently, effective and realistic training throughout the world is a necessity if we are to rely on the men and women of the National Guard to perform their federal mobilization missions within current deployment schedules. Adequate training for National Guard members who have become more directly involved in our defense posture under the Total Force Policy is an operational necessity and also an obligation, owed to those guardsmen who will be committed to the battlefield, to enhance their proficiency and ability to fight and survive.

Recently, valuable National Guard training overseas has been used by certain individuals and special interest groups to affect larger debates on U.S. foreign policy. While these efforts have been focused on Central America, the real issue illuminated by this controversy is the obsolescence of certain

statutory authorities that permit units and members of the National Guard to train outside the United States or its territories. These statutory authorities, enacted by the Congress as a part of the Armed Forces Reserve Act of 1952 (21 years before the advent of the Total Force Policy), require modification that will reflect and support the greater responsibilities of today's National Guard, and the more intense and realistic training now required to ensure it is fully ready to perform the world-wide missions it has been assigned.

I will come back in a moment to the subject of realistic training for the National Guard in today's Total Force environment and the risk posed by those who would interfere with it for political purposes. But first, I would like to address the constitutional question regarding the interaction of the militia clause and the army clause contained in Article I, section 8 of the Constitution.

THE DUAL STATUS OF THE NATIONAL GUARD

The militia clause of the U.S. Constitution provides that:

"The Congress shall have Power . . . To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Prior to 1903, the National Guard was organized and administered solely under the militia clause of the Constitution. Consequently, the National Guard was available only for limited duties. As one example, the Governors of Massachusetts and Connecticut refused the President's call for the militia when the British blockaded our coasts in 1813, invaded our territory, and destroyed the capitol. As another, the militia was not

available during the Mexican War of 1846. And, with the exception of those members of the militia who volunteered to serve outside the United States, the militia was again unavailable during the Spanish-American War of 1898.

In the years that followed, Congress began to exercise its dormant power to organize and regulate the militia. This power was first exercised in the Dick Act of 1903, which provided for an Organized Militia, known as the National Guard, equipped through federal funds, and trained by Regular Army instructors. The scope of federal control was further broadened in the Act of 1908, the National Defense Act of 1916, and the Army Reorganization Act of 1920. These exercises of Congressional power made the National Guard available for service abroad; funded National Guard armory drills; required the states to conform to the provisions of the law to obtain federal money; curtailed the constitutional provision "reserving to the States . . . the Appointment of Officers" by prescribing the qualifications of National Guard officers and providing for their recognition by federal authorities; required every officer and enlisted member of the National Guard to take a dual oath to support the Nation and the state and to obey the Governor and the President; made National Guard officers eligible for Reserve commissions; and provided for a Guardsman as the Chief of the Militia Bureau of the War Department.

Even here, however, there were limitations. For instance, members of the National Guard were required to be conscripted in order to be brought into federal service during World War I.

Finally, in the Act of June 15, 1933, the Congress resolved long-standing problems posed by the limitations of the militia clause by making the National Guard a part of the Army at

all times. It did this by exercising its powers under Article I, section 8, clause 12 of the Constitution "to raise and support armies. . ." to constitute the Guard as a reserve component of the Army called the National Guard of the United States. As a reserve component of the Army, the National Guard of the United States was to be organized and administered under the army clause of the Constitution, not the militia clause, and its units could be ordered into federal service. The Militia Bureau was done away with, and the National Guard Bureau was established in its place.

The dual state-federal status of the National Guard established by the Congress in 1933 remains intact today. The National Guard has, at the same time, a state role as the Army National Guard or the Air National Guard and a federal role as the Army National Guard of the United States or the Air National Guard of the United States. The fact that the National Guard may train or operate, at various times and under various circumstances, in either a federal status or a state status, does not affect or alter its dual status. On the contrary, the character of National Guard service at any given point in time is a manifestation of the dual state-federal status of the National Guard.

The current statutory basis for the Guard reflects Congressional intent that the National Guard is "a part of the Army at all times" and that "every guardsman is a Federal reservist as well as a State militiaman." H.R. Report No. 1066, 82d Cong., 1st Sess. pg. 9 (1951). The matter of when the National Guard shall serve in a federal status, with or without the consent of a governor, is a legislative issue for the Congress to resolve, and not a constitutional issue.

In considering the legislative proposal to require that training of the National Guard outside the United States, its ter-

ritories, and possessions shall be conducted in active federal service, the Office of the General Counsel has concluded the militia clause does not present a constitutional obstacle to such legislation because National Guard units and members, whether or not in actual federal service, have a dual status, both as the organized militia (the Army and Air Force National Guard, 10 U.S.C. section 101 (10), (12)) and as units and members in the reserve components of the Army and Air Force (Army and Air Force National Guard of the United States, 10 U.S.C. section 101 (11), (13)). This dual status reflects the fact that the constitutional authority for the statutes governing the Guard stems not only from the militia clause, but also from the broad power of the Congress to "raise and support armies," U.S. Const., art. I, section 8, cl. 12. See Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 207-10 (1940). Therefore, regulation of the National Guard when not in federal service is not governed solely by the militia clause.

The continued status of guardsmen as members of a federal reserve component under the army clause of the Constitution, even when not in actual federal service, is underscored by statutes such as 10 U.S.C. sections 3686 and 8686, which provide that their training as members of the National Guard is considered to be training in federal service for purposes of providing benefits to members of federal reserve components.

The Congress alone is empowered under the army clause to determine when the National Guard shall serve in federal status (active duty), and the militia clause is not an obstacle to exercising its legislative power. See Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969).

This Congressional authority also includes power to establish the training requirements of the National Guard.

THE TRAINING REQUIREMENTS OF THE NATIONAL GUARD

The training requirements of the National Guard have been established by the Congress in chapter 5 of title 32 of the United States Code. Section 501 of title 32 provides that:

"The discipline, including training, of the Army National Guard shall conform to that of the Army. The discipline, including training, of the Air National Guard shall conform to that of the Air Force."

Section 502 provides that National Guard units are required, under regulations prescribed by the Service Secretaries, to "participate in training at encampments, maneuvers, outdoor target practice or other exercises, at least 15 days each year."

Section 503(a) further provides that:

"Under such regulations as the President may prescribe, the Secretary of the Army and the Secretary of the Air Force, as the case may be, may provide for the participation of the National Guard in encampments, maneuvers, outdoor target practice, or other exercises for field or coast defense instruction, independently or in conjunction with the Army or Air Force, or both."

The authority of the federal government to regulate these matters is underscored by section 108 of title 32 of the United States Code, which provides that:

"If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law."

The broad authority of the Service Secretaries under sections 502 and 503 necessarily includes the authority to specify the location of such activities. Consequently, this authority may be used to require National Guard training outside the United States. As an integral part of the Total Force, National Guard members and units now receive the best and most realistic overseas training that can be provided in order to ensure they are prepared to fulfill their federal mobilization missions.

NATIONAL GUARD TRAINING OUTSIDE THE UNITED STATES

Legislation enacted in the throes of the Korean War provided, for the first time, a comprehensive and satisfactory scheme of voluntary and involuntary training for the reserve components of the armed forces. Subsequent revisions to reserve component training and mobilization statutes begun in the early 1950's provided the framework for a National Guard and Reserve that would be truly ready to mobilize and deploy on short notice, and which could and would participate in joint exercises with the active forces and work side-by-side in accomplishing peacetime missions.

The Guard wasted little time in adjusting to the national requirement for the reserve components to become a "force in being." By the late 1950's, 20 Air National Guard tactical squadrons were participating in the Air Defense Augmentation Program. By 1967, the annual contribution of Air National Guard fighter units involved more than 17,000 missions, including more than 40,000 successful intercepts and nearly 90,000 man-days on alert, of which 7,500 were on nuclear alert.

In 1961, during the Berlin Crisis, 76,000 Army National Guard and Air National Guard members were ordered to extended active duty. Air National Guard units deployed to Germany, France, and Spain. During the 1960's, the Air

Guard also began support of an overseas command on a regular basis for the first time. Air National Guard refueling units were deployed to Central Europe in 1967 to provide refueling training and an emergency capability to USAFE tactical aircraft. Throughout the decade of the 60's, the Air National Guard supported the Military Airlift Command in Southeast Asia, Labrador, Greenland, the Congo, Europe, Australia, the Dominican Republic and elsewhere. These missions were flown on a volunteer basis and as part of normal training requirements.

In 1977, 26 Army National Guard company-sized units participated in annual training outside the United States. Five years later, 43 units and nearly 7,000 members of the Army National Guard participated in overseas deployment training. In 1985, more than 39,000 Army and Air National Guard members completed overseas training in 44 countries and 64 exercises. By the end of 1986, more than 42,000 National Guard members will have participated in overseas training and 69 exercises in 46 countries, including countries in Central America.

This year, 9,000 National Guard members from 43 states and territories will train in Central America. Of these, 5,300 National Guardsmen from 18 states will deploy and train in Honduras. This is not a new concept. The National Guard has been training in Central America since the early 1970's. The National Guard and Reserve train throughout the world to achieve the operational readiness levels required of their units. The added realism of training outside the United States, in terrain, climate, transportation and use of equipment, differences in operating procedures, and language, provides the best environment that tests every member of a unit and enhances readiness.

THE SOURCE OF THE PROBLEM

Obviously, intercepts of aircraft approaching U.S. airspace and nuclear alert duties cannot be performed by guardsmen in state status. Similarly, members of the National Guard who perform training or duty outside the United States, its territories, or possessions must be ordered into federal service (active duty) in order to comply with our responsibilities under international agreements on defense cooperation, to ensure that clear military lines of command and authority operate while our forces are in areas outside the jurisdiction of the United States, to protect individual National Guard members under status of forces agreements and international law, and to ensure that their status and benefits are not jeopardized should they be subjected to terrorist acts while training overseas or traveling to or from overseas training sites. Federal service also is required since members of the National Guard not in federal service do not possess rank, seniority, or military justice equivalence with active component forces.

For these reasons, members and units of the National Guard always are ordered into federal service for the purpose of training outside the United States.

In exercising its power to determine when the National Guard shall serve in federal status, the Congress has provided only two statutory authorities for ordering members or units of the National Guard to active duty for the purpose of training. These authorities are found in sections 672(b) and 672(d) of title 10 of the United States Code. All other statutory authorities governing the call of the National Guard to active duty pertain to a declaration of war or national emergency by the Congress, a declaration of national emergency by the President, or the Presidential 100,000 call-up to augment the active forces for an operational mission.

Sections 672(b) and 672(d) provide that:

"(b) At any time, an authority designated by the Secretary concerned may without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection *without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.*" [emphasis added]

* * * * *

"(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection *without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.*" [emphasis added]

While neither of these statutory provisions specifically address National Guard training outside the United States, they are the only authorities available, short of war or national emergency, that enable us to satisfy the requirement for service in an active duty status while outside the United States. Consequently, even when the National Guard is in federal service

for the purpose of training abroad, no member or unit may train in such federal status, voluntarily or involuntarily, without the consent of the state or territorial governor concerned.

The statutory source of the requirement in sections 672(b) and (d) for the governor's consent is section 233(c) and (d) of the Armed Forces Reserve Act of 1952. And, before I go any further, I believe it is important at this point to reiterate that the determination of when the National Guard shall serve in a federal status is a power exercised by the Congress under the army clause of the Constitution. It was the Congress, in the Armed Forces Reserve Act of 1952, and not the Constitution, that granted to the governors of the states and territories the authority to give or withhold their consent to training National Guard members in a federal status.

Although the legislative history is not extensive, it does show that the requirement for the governor's consent to training in a federal status was added to the Armed Forces Reserve Act at the request of the National Guard Association. (U.S. Congress, House. Armed Services Committee. Hearings, 82nd Cong., 1st Sess., 1951. (See "Reserve Components," p.788)). It was apparently designed to meet objections that the proposed legislation, which was broadly worded, tended to unduly alter the balance between federal and state roles of the National Guard. Congress indicated that the purpose of the Act was not to alter the traditional role of the Army and Air National Guard in the defense structure. In the context of annual training, for example, the *proviso* for the consent of the governor was apparently intended to act as a safeguard so that section 233(c) of the Act would not be construed to affect the authority for training of Army and Air National Guard units in a state status.

There is no way that the Congress in 1952 could have foreseen the evolution of the Total Force Policy two decades later that would so alter the training environment of the National Guard. When it added the "without the consent of the governor" provisions of section 672, overseas training missions did not exist, and other training was being conducted largely on outmoded equipment for long-term, standby missions.

THE PROBLEM

For many years, realistic National Guard training outside the United States has not been a controversial issue or problem. However, beginning in 1985 and particularly this year, special interest groups and some state legislators discovered that the authority granted state governors in sections 672(b) and (d) rendered state governors susceptible to political pressure on controversial Administration policies. Moreover, such pressure could be exerted at the local level and, due to media interest in such controversy, given national exposure. Consequently, the governors' authority has become a vehicle to debate or influence foreign policy.

In January, 1985, the Governor of California refused to permit 450 unit members of the California National Guard to participate in AHAUS TARA III, a combined anti-armor training exercise in Honduras. The National Guard Bureau was forced to use the Texas National Guard, but it could not do so until the Governor of Texas was provided a briefing on the exercise and given specific assurances of troop safety.

In January, 1986, the Governor of Maine refused to permit members of the Maine National Guard to participate in GENERAL TERENCIO SIERRA 86, a road building exercise in North Central Honduras, and another training exercise in Panama. In addition to his concern for the safety of members of the Maine National Guard, Governor Brennan said in an article in the *Kansas Journal*:

"I also believe that any military presence, regardless its intent, in a country like Honduras, whose economic and educational needs far outstrip its military needs, will foster misunderstanding and aggravate any misgivings. A hostile reaction to such a presence is blind to a distinction between those who carry rifles and those who carry shovels. Thus, I believe it is a needlessly dangerous course being pursued, but it is a course that governors throughout the country can—and should—alter."

Since January of 1985, the dimension of this problem has grown considerably. As of today, three governors (California, Maine, and Ohio) have refused to permit National Guard units and members to participate in training in Honduras. Three other Governors (Massachusetts, Vermont, and Washington) have said they would not permit such training if their permission was requested. Six governors (Arizona, California, New Mexico, New York, Texas, and Puerto Rico) have conditionally permitted National Guard training in Central America but have reserved their consent for a case-by-case determination. Twenty state legislatures have considered the issue of National Guard training in Central America and remain divided. Last March, the Iowa House passed a non-binding resolution calling on the Governor to cancel the participation of an Iowa National Guard medical and dental unit in a training exercise in Honduras. In April, the California Senate also passed a non-binding resolution urging the Governor to:

"... reverse his decision forthwith and bring home the members of the California National Guard now in Honduras, and to join with the Governors of other states in declining to send members of the National Guard to Honduras; . . ."

And, according to the *Los Angeles Times*, July 8, 1986, two California Assemblymen:

"... are pushing ahead with plans for an amendment to the state Constitution that would require the Legislature's approval before the governor could allow guardsmen to be sent to any country where there had been armed conflict within two years."

Last month, the Americans for Democratic Action Foundation filed a Complaint in the Los Angeles Superior Court on behalf of three plaintiffs seeking a Preliminary Injunction, Permanent Injunction, Declaratory Relief, and a Temporary Restraining Order restraining the Governor of California from permitting the California National Guard to deploy outside the United States without a declaration of a national emergency or war. The court denied the request for a Temporary Restraining Order and scheduled a July 14, 1986 hearing on the petition for a Preliminary and Permanent Injunction.

This is no longer a case of a few isolated incidents; it is a demonstrated way for dissent groups, state legislators, and state governors to seize a forum to debate foreign policy. To date, the issue has been focused on Central America, which is precisely where some governors and the special interest groups want it to be focused. But, the issue is not Central America. It is the equal readiness of National Guard units which will deploy more quickly than ever before in our history if we were to go to war, which are equipped with modern equipment against that possibility, and which must train on an equal level with their active counterparts. Under present law, it is conceivable, and quite possible, that similar interference could take place in routine and uneventful National Guard training in Europe, Korea, the Mideast, any other geographic region, and even with specific operations such as the recent Air National Guard participation in refueling the aircraft that conducted the Libyan raid.

THE ALTERNATIVES

In the absence of clarifying legislation to bring parity between National Guard, Reserve, and Active forces with respect to their obligations to train outside the United States, the alternatives are to do nothing; to reconsider the present distribution of missions between the National Guard and the other reserve components of the Army and Air Force; to give the fullest resourcing under the Total Force Policy to those units that are able to participate in "real world" training missions since those units, by the nature of their training, are the units that can be counted on at the onset of a mobilization; or to leave this matter as a subject of case-by-case negotiation, dependent on the goodwill of various governors, legislatures, and protest movements.

Doing nothing jeopardizes the combat readiness of those units affected. It also may foster 54 foreign policies inconsistent with that of the United States Government. Indeed, we are here today precisely because this has, to a lesser extent, already occurred. I can tell you, in the case of the latter alternative, that trying to stay in front of politically motivated groups in 54 states and territories can be a futile effort. And even when it is successful, the effort can prove costly. As an example, a governor recently made an overnight visit to Central America by way of U.S. government jet aircraft, which he had requested. He was accompanied by the state Senate President Pro Tem and the state House Speaker to observe the state's National Guard members in action. This overnight, goodwill effort, while producing favorable reactions from the three state officials, would have cost the American taxpayer approximately \$86,000 had the Department of Defense not required that the air support be provided on a reimbursable basis. The cost will now be borne by the state's taxpayers.

Apart from cost, it should not be a function of the Department to traverse the country trying to convince as many individuals or groups who seek to politicize the training environment of the National Guard of something we have known for many years—that overseas training missions are absolutely essential to fully preparing the National Guard to execute the mobilization missions it has been assigned.

CONCLUSION

In conclusion, Mr. Chairman, the proposed legislation would not alter the basic framework which provides that National Guard training will be conducted by the states under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force in conformance with training of the Army and the Air Force. It would not alter the well-established fact that until the National Guard is ordered into federal service it remains in a state status subject to the control of the governor. It would not alter the status in which National Guard members now routinely serve when training outside the United States. Nor would it impose any greater burden on National Guard members than that presently borne by members of all other federal reserve components.

When Congress passed the Armed Forces Reserve Act of 1952, it delegated to the governors of the states a portion of its power to determine when the National Guard would serve in a federal status. That delegation, however, was predicated upon the very broad language of section 233(c) which, but for the requirement of the governor's consent, would have permitted ordering the National Guard to active duty for all training purposes. This is not the case at hand. Since National Guard training outside the United States must be conducted in federal service, and since the proposed legislation is restrictively limited to such training overseas, the proposed legisla-

tion does not affect, and could not be construed to affect, the authority for training National Guard units in all other instances in a state status.

I am mindful of the sensitivities of rescinding an authority of a governor, once granted. But, it should not go unnoticed by the Congress that those sensitivities can be more offended by perceptions than they can by any real loss of authority. The consent provisions of sections 672(b) and (d) have not always been exercised by governors. In fact, it is not incorrect to say that some governors, until recently or possibly even now do not know that certain members or units of their National Guard are training overseas. For example, Air National Guard Regulation 35-03, which applies to all Air Guard members serving in a full-time military duty status in accordance with section 502(f) of title 32, specifies that the orders that place these members in a full-time military duty status will include the statement:

"Authority is given for any mission-directed OCONUS TDY that the individual will automatically be placed under 10 USC 672(d) for duration of TDY and will automatically revert back to 32 USC 302(f) after completion of TDY."

It further specifies, for aircrew members who perform alert duties, the statement:

"Authority is given for any period of alert duty that the individual will automatically be placed under 10 USC 672(d) for the duration of that period, and automatically revert back to 32 USC 302(f) after completion of the period of alert duty."

In effect these statements, routinely used by the Air National Guard, presume standing consent. While the law requires the governor's consent whenever a member or unit of the National

Guard is ordered to active duty under the provisions of section 672(d), actual consent is not always a routine practice.

I want to make it clear that we most emphatically do not support a revision of the dual status of the National Guard as both a state and a federal force. As is readily apparent, the structure is legally complex, but the result has been a resounding success that is uniquely American. The National Guard has provided the states with well-trained and readily available forces for use during civil disorders and natural disasters. It also has provided the United States with two reserve components that figure prominently in our national defense and account for more than one-half our total Selected Reserve manpower.

The problems which we discuss today are, in my view, primarily technical in nature. They can be resolved. The Congress has gone to great lengths in the law to ensure that members of the National Guard who are serving in state status receive full credit and protection as though they were serving in federal status. This shows we can deal with this complexity to protect the member, to preserve the prerogatives of the states, and to make certain all training requirements of the Army National Guard and Air National Guard are fully met. Thus, it is all the more critical that a successful resolution to the matter under discussion be achieved without delay.

While we refer with great and justifiable pride to the development of the National Guard during the past 350 years, from the Old North Regiment of the Colonial militia in 1636 to today's modern army and air units, we also know that the success of this development has been dependent on accommodation to changing realities and the role of the United States as a leader of the free world.

In 1776, George Washington warned the Congress that "[t]o place any dependence upon the Militia, is, assuredly, resting on a broken staff." We have come a long way in 210 years. Some of these developments during these years were made in response to hard experience, others were the result of foresight.

We do not believe that legislative changes of the form under discussion would significantly revise the actual practice of training the National Guard units as it has evolved over the last 35 years. It would, however, remove an important anomaly in current law and eliminate an improper forum for the debate of foreign policy at the expense of those who train, and who will fight, to defend it.

Thank you, Mr. Chairman.

(Title omitted.)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court be reversed and the cause remanded to the district court for proceedings consistent with the opinion of this Court.

December 6, 1988

Order entered in accordance with opinion.

ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals,
Eighth Circuit

(Title omitted)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

J.A. 32

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

June 28, 1989

Order entered in accordance with opinion.

ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals,
Eighth Circuit

(5)
No. 89-542

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

RUDY PERPICH, as Governor of
The State of Minnesota,

and

THE STATE OF MINNESOTA,
by its Attorney General
Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Respondents.

On Writ Of Certiorari To The United States
Court of Appeals For The Eighth Circuit

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Does the Montgomery Amendment, which gives the federal government power to require National Guard training without governors' consent and without a declaration of a national emergency, violate the militia training clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following are respondents: United States Department of the Air Force, United States Department of the Army, National Guard Bureau, the Secretary of Defense, the Secretary of the Army, the Secretary of the Air Force, and the Chief of the National Guard Bureau.

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No. 89-542

In The

Supreme Court of the United States

October Term, 1989

RUDY PERPICH, as Governor of
The State of Minnesota,

and

THE STATE OF MINNESOTA,
by its Attorney General
Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Respondents.

On Writ Of Certiorari To The United States
Court of Appeals For The Eighth Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinions below are set forth at pp. A-1, A-63 and
A-141 of the Petition For Writ of Certiorari To The United
States Court of Appeals For The Eighth Circuit in this
case.

The opinion of the district court is reported at 666 F. Supp. 1319 (D. Minn. 1987) and appears at A-141.

The panel opinion of the United States Court of Appeals for the Eighth Circuit is unreported and appears at A-63.

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit is reported at 880 F.2d 11 (8th Cir. 1989) and appears at A-1.

JURISDICTION

The jurisdiction of this Court is asserted pursuant to 28 U.S.C. § 1254(1). The Petition For Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit was timely filed on September 26, 1989, within 90 days after entry of judgment on June 28, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Art. I, § 8, cl. 12 ("army clause")

Art. I, § 8, cl. 15 ("militia federalization clause")

Art. I, § 8, cl. 16 ("militia training clause")

UNITED STATES STATUTES

10 U.S.C. §§ 672(b), (d) and (f) (1988) (The text of these constitutional and statutory provisions are reprinted in the Appendix to this brief).

STATEMENT OF THE CASE

The states and the federal government have shared control over the militia, pursuant to the provisions of Article I, Section 8 of the United States Constitution, for nearly 200 years. Congress was granted the power to

raise armies and to discipline and call the militia into the federal service when the national security was threatened. In the absence of such threat, the states were reserved general authority over the militia and the express power to train the militia and to appoint its officers. This shared control reflected a firm desire by the Framers of the Constitution to provide a check on the abuse of federal military power. The militia, which is now called the National Guard, is available to the states to handle local emergencies and is federally trained throughout the world. Such training, however, has been done at the governors' expressed consent, reflecting the states' reserved constitutional power over training.

In 1985, state National Guard units from various states were ordered to train in Honduras. The orders were controversial and immersed the National Guard in the intense national debate over the wisdom of United States policy in Central America. Several governors objected to using state National Guard training in a provocative and possibly dangerous manner in a politically sensitive area. The Governor of Maine refused consent to training of a 48-member unit in Honduras and several other governors threatened to follow suit.

A U.S. Senate subcommittee responded in 1986 by conducting hearings to examine whether the governors' statutory consent provisions should be modified. After objections by 22 governors, among others, the idea was abandoned. However, the effort was resurrected in the House of Representatives in the form of an amendment to a defense appropriations bill. Debate was limited to ten minutes. The measure passed and was included in the bill

signed by President Reagan. The "Montgomery Amendment," as the law became known, prohibits governors from withholding consent to federal training outside the United States because of any objection to the location, purpose, type, or schedule of the training.

When confronted with an order in January, 1987, sending a Minnesota National Guard unit into training in Honduras, Governor Rudy Perpich and the State of Minnesota sought a permanent injunction against enforcement of the Montgomery Amendment. Complaint, J.A. 3-8. Governor Perpich and the state also sought a declaration of the court that the Montgomery Amendment violates provisions in the Constitution which expressly reserve training power to the states. *Id.* Under the Montgomery Amendment, Governor Perpich, as Commander-in-Chief of the Minnesota National Guard, could no longer refuse consent to overseas training.

Defendants moved for dismissal of the complaint for failure to state a claim upon which relief can be granted, and plaintiffs moved for summary judgment. A-142. The district court treated defendants' motion as one for summary judgment, granted defendants' motion and denied plaintiffs' motion. A-142, A-153.

A three-judge panel of the court of appeals reversed the judgment of the district court and found that the Montgomery Amendment violated the states' reserved training power. A-123. The defendants petitioned for rehearing. The petition was granted, and the panel's opinion and judgment was vacated. A-62.1. The *en banc* court of appeals affirmed the judgment of the district court with two judges filing a dissenting opinion. A-1

SUMMARY OF ARGUMENT

The United States Constitution expressly reserves to the states the authority of training the National Guard. The Montgomery Amendment nullifies this specific reservation by prohibiting the elected governors of the states from exercising control over foreign training of the National Guard. The opinion of the court of appeals strikes even further at the constitutional guarantee by finding that Congress possesses unlimited power to federalize the National Guard at any time, for any reason, and for any duration.

The plain meaning of the militia training clause cannot be more evident. The authority of training the National Guard is reserved to the states. The Montgomery Amendment eliminates that authority, one of the few express powers reserved to the states, and is unconstitutional.

Provisions of the Constitution must be construed harmoniously in order to give full effect to all of its guarantees. The court of appeals decision fails to harmonize the army clause with the militia training clause and instead grants Congress unlimited authority to ignore the militia training clause. Harmonious construction of the clauses requires a finding that the Montgomery Amendment is unconstitutional.

The Framers of the Constitution intended to provide shared state-federal control over the National Guard. The debates at the constitutional convention demonstrate that the militia training clause was intended to impose a state check on the abuse of federal military power in the absence of a compelling national exigency, or emergency.

It was the Framers' judgment that divided state-federal authority over the National Guard was an important balance between the need for an effective national defense and the need to prevent abuses of centralized military authority. The intent of the Framers is an important guide to the proper interpretation of the interplay between the army clause and the militia training clause. The court of appeals ignored this important authority. If the court had examined the Framers' intent, it would have found that the Montgomery Amendment clearly violates the Constitution.

Congress has consistently recognized the states' reserved authority over training in the absence of an emergency. The Dick Act of 1903, the National Defense Act of 1916, the National Defense Act Amendments of 1933 and the Armed Forces Reserve Act of 1952 all preserve state control over National Guard training in the absence of a threat to the national security. The Montgomery Amendment is the first Congressional enactment which fails to recognize the militia training clause.

The Court's opinion in the *Selection Draft Law Cases* was misinterpreted by the court of appeals. In this World War I decision, the Court addressed the constitutionality of mandatory conscription during a declared war. The decision also suggests reserved state control over National Guard training in peacetime in the absence of a national exigency. It provides no support for the Montgomery Amendment.

The dual enlistment concept, under which state National Guardsmen are required to register concurrently as members of the National Guard of the United States, does not and cannot eliminate state reserved authority over training. The court of appeals erred by permitting

Congress under the dual enlistment concept to simply call the militia a different name and eliminate at will its essential constitutional character.

The Montgomery Amendment cannot be justified by practical necessities. At any time the national security is threatened, the National Guard can be quickly integrated into the federal service. Claims that the Montgomery Amendment is necessary to preserve our national defense or to prevent the nation's governors from conducting foreign policy are wholly unsupported. The court of appeals decision granting Congress unlimited power to nullify the states' reserved authority over training, at the mere whim of federal authorities, is incorrect. The Montgomery Amendment is an unnecessary federal power grab that violates an unambiguous command in the text of the United States Constitution.

ARGUMENT

I. THE PLAIN MEANING OF THE MILITIA TRAINING CLAUSE AND THE REQUIREMENT THAT CONSTITUTIONAL PROVISIONS BE CONSTRUED HARMONIOUSLY REQUIRE INVALIDATION OF THE MONTGOMERY AMENDMENT.

The Montgomery Amendment disregards the express language and plain meaning of the militia training clause which expressly reserves to states the authority to train the militia. By removing the gubernatorial consent requirement, the Montgomery Amendment permits federalization of the National Guard for training without states' consent and eliminates the power expressly reserved to the States in the militia training clause. The Montgomery Amendment can be upheld only by finding

that the militia training clause is no longer valid, thus betraying the principle that constitutional provisions are to be construed harmoniously.

A. The Montgomery Amendment Violates The Plain Meaning Of The Militia Training Clause.

The militia training clause authorizes Congress

To provide for organizing, arming and disciplining the Militia and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress.

The plain meaning of the words – reserving to the states the authority of training the militia – cannot be more clear. The Constitution in Article I, Section 8, grants significant military powers to the federal government, but specifically excepts from those powers the authority of training the National Guard.¹ That power is reserved to the states.

In *Reid v. Covert*, 354 U.S. 1 (1957), Justice Black noted the importance of the plain meaning of the Constitution.

This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning. . . . 'The Constitution was written to be understood by the voters; its words and

¹ The "National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution." *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46, vacated on other grounds, 382 U.S. 159 (1965).

phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. . . . The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended.'

Id. at 8 n.7. citing *United States v. Sprague*, 282 U.S. 716, 731 (1931).

The plain evident meaning of the militia training clause is that the states, not the federal government, are authorized to train the militia. The words "reserve" and "authorize" have obvious meanings. See, e.g., *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11, 18 (1815) (reserve means "set apart"); *Blair v. City of Chicago*, 201 U.S. 400, 457 (1906) (authorize means "to clothe with authority" or "to give legal power to"). "Discipline," as used in the context of the militia training clause, means uniform training exercises and was intended to ensure that states trained the militia according to the same standards. See *infra* n.5.

In contrast to the general reservation of state powers in the Tenth Amendment, the Court has a heightened duty to effectuate the plain meaning of the militia training clause because the clause is one of the few express elements of state sovereignty specifically reserved by the Constitution. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985) (noting significance of specifically reserved state powers in contrast to general reservation in Tenth Amendment). The court of appeals

judgment upholding the Montgomery Amendment contravenes "the general conviction that the Constitution precludes 'the National Government [from] devour[ing] the essentials of state sovereignty.'" *Id.* at 549 (citation omitted).

By construing the Constitution to permit federal authorization of National Guard training whenever the army clause power is invoked, the court of appeals emptied the militia training clause of any significant meaning.

B. The Militia Training Clause Is An Integral Part Of The Constitutional System Of Shared Control Over Military Authority.

The militia training clause is part of a carefully designed system of constitutional checks and balances intended to assure shared control over military authority. Congress is granted broad powers to raise and support federal armies, but military appropriations are limited to a two-year duration. U.S. Const. art. I, § 8, cl. 12. The power to train the militia and to appoint its officers is reserved to the states, but Congress is to specify the training regimen. *Id.*, cl. 16. The states' right to maintain a militia is further guaranteed by the Second Amendment. *Id.*, amend. II. Congress is granted the power to federalize the militia, but only during periods of extreme need, such as a declared national emergency, or one of the express purposes described in the militia federalization clause. *Id.* art. I, § 8, cl. 15; see discussion *infra* at 15-16. This constitutional framework is carefully designed, and the reservation of training authority to the states should be observed no less than Congress' power to raise and support federal armies or the two-year military appropriation limit.

By nullifying the states' reserved power to consent to overseas federal training of the National Guard, the Montgomery Amendment eliminates an integral part of the constitutional framework for shared control of military authority.

C. The Principle Of Harmonious Construction Requires Invalidiation Of The Montgomery Amendment.

The court of appeals decided that the army clause completely subordinates the militia training clause and, as a result, the Montgomery Amendment is constitutional. In other words, whenever Congress in its discretion chooses to exercise army clause powers, the militia training clause is inoperative and has no effect or meaning. The court tautologically characterized the issue before it as:

[W]hen the State claims a right to Militia training, and Congress claims 'we're training the Army, not the Militia,' who wins?

Court of Appeals Opinion at A-9. The court of appeals thereby unburdened itself of any obligation to construe constitutional provisions harmoniously. Its construction nullified the militia training clause.

The principle of harmonious construction is useful and long-standing. Under the Constitution, "granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Just "[a]s no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." *Ullman v. United States*, 350 U.S. 422, 428 (1956).

The Court should:

[G]ive to the words of each [clause of the Constitution] just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. . . . If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail.

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 610-612 (1842).

The invocation of Congress' army clause power does not nullify any other clause. The power is not plenary. It "cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought into its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' " *United States v. Robel*, 389 U.S. 258, 264 (1967) (quoting *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 426 (1934)).² While Congress' power to raise and support armies is broad, it cannot be construed in a manner which nullifies other constitutional guarantees.

² See also *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (in military affairs area as in any other, Congress subject to limitations of Due Process Clause); *Gillette v. United States*, 401 U.S. 437 (1971) (army power must accommodate establishment clause of first amendment); *United States v. O'Brien*, 391 U.S. 367 (1968) (army power must accommodate first amendment free speech); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963) (war powers and powers to regulate foreign relations subject to due process); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) (war power subject to applicable constitutional limitations).

The application of harmonious construction in this case yields a principled and practical result that does not diminish the scope of either the army or militia training clauses. It permits governors to withhold consent to National Guard training exercises whenever the National Guard is not needed for a declared national emergency. The two clauses are thus harmonized in a manner that gives full effect to each grant of authority.

The court of appeals interpretation violates the unambiguous meaning of the militia training clause and fails to construe harmoniously all constitutional provisions concerning military authority. The court permitted the Montgomery Amendment to cast aside the balance that has worked well in practice for nearly 200 years.

II. THE FRAMERS' INTENT CONCERNING THE MILITIA CLAUSES OF THE CONSTITUTION IS VIOLATED BY THE MONTGOMERY AMENDMENT.

The plain meaning of the militia training clause is reflected in the clear and unambiguous intentions of the Framers. An examination of the Framers' intent, which the court of appeals failed to make, demonstrates that the states' authority reserved in the militia training clause was intended to provide a state check on the abuse of federal military power, without handcuffing the national defense power during a national emergency.

A. Provisions Of The Constitution Must Be Construed In Accordance With The Intent Of The Framers.

The vital importance of the Framers' intent in construing the Constitution is unquestionable.

The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change the Constitution in a sense changes as well. But when the court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers. This is necessarily so; the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the Constitutional structure which it is its highest duty to protect.

Oregon v. Mitchell, 400 U.S. 112, 202-03 (1970) (Harlan, J., concurring in part and dissenting in part) (footnotes omitted). See also *Ex parte Bain*, 121 U.S. 1, 12 (1887) (court should put itself "as nearly as possible in the position of the men who framed that instrument"); *Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1874) (constitutional clauses are to "be held to express the intention of its Framers").

B. The Militia Clauses Were A Compromise Which Divided Authority Over The Militia Between The Federal Government And The States.

The delegates to the Constitutional Convention in 1787 were deeply divided over the core governmental function of control of the military. Nationalist delegates

believed the federal government must have total control over state militias in order to ensure the nation's defense. States' rights delegates feared that such federal power over state militias would lead to oppression of the states and citizenry, to an inability by the states to meet their own needs, and to costly, unpopular military adventurism.

After several months of proposals and hard-fought debates, it became apparent that neither nationalist nor states' rights delegates had sufficient power to impose their views regarding control of the militia. The ability of the states' rights delegates to exact significant concessions, however, is clearly demonstrated by the debates at the Convention. The Convention ignored a proposal by Alexander Hamilton that would have given the federal government plenary control over the militia.³ See J. Madison, *Notes of Debates on the Federal Convention* 164 (Hunt 1920). Delegate George Mason of Virginia offered three successive proposals to the Convention, each providing increased state control over the militia. The final proposal, which was also rejected, called for limiting federal "regulatory" authority over the militia to only ten percent of the year for the purpose of establishing uniformity in training. S. Doc. No. 695, 69th Cong., 2d Sess. 31-35 (1917) ("*The Militia*").

Eventually, a finely tuned compromise began to emerge, dividing militia authority between the federal and state governments. The Convention agreed that the state militias would be placed under federal control in

³ Ironically, Hamilton's unsuccessful proposal mirrored the effect of the Montgomery Amendment at issue in this case.

emergency situations, such as when insurrection or invasion was threatened, or when the militias were needed to enforce the laws of the country. U.S. Const. art. I, § 8, cl.

15. However, in the absence of such threat, the states would retain authority over their militias. *Id.* art. I, § 8, cl.

16. The compromise also authorized Congress

[t]o provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States,

while concurrently

reserving to the States respectively the Appointment of the Officers, and *the Authority of Training the Militia* according to the discipline prescribed by Congress.

Id. (emphasis added).

The authority to appoint officers was given to the States in order to secure for them "a preponderating influence over the militia." *The Federalist* No. 29 at 185 (A. Hamilton) (J. Cooke ed. 1961) ("Cooke").

The debates at the Constitutional Convention indicate that the militia training clause was designed to ensure that the power to "organize, arm, and discipline" state forces delegated to the federal government by the militia clauses did not surreptitiously extend federal control over the actual training of the militia. Delegate Sherman suggested that the clause relating to training should be deleted because he believed it "unnecessary." He believed that the States would obviously retain this authority unless they specifically ceded it to the Federal government. Madison's Notes of the Convention, reprinted in *The Militia*, *supra*, at 35. In response, Delegate

Elsworth cautioned Sherman that the federal "discipline" power over the militia might be construed expansively without the state reservation of training provision.

Madison's notes contain the following:

Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be so expounded as to include all power on the subject.

Id. After hearing Elsworth, Mr. Sherman withdrew his motion to delete the training clause. *Id.*

The militia clauses embody a fundamental structural decision by the Framers concerning a core function of government.⁴ They provide a finely tuned divided authority over the militia reflecting a hard fought compromise between two factions. The compromise provided the federal government plenary control over state militia troops when the national security was threatened. In the

⁴ The delegates adopted another significant check on centralized military power. They permitted a standing federal army, but divided authority over it between Congress and the Executive and specifically limited the army's power by declaring that military appropriations had to be approved every two years. U.S. Const. art. I, § 8, cl. 12. Nearly universal among the delegates was the profound fear of a large, federally controlled standing army. The Framers identified such a force with British tyranny, potential oppression of the States and individual citizens, and expensive, unpopular military adventures. As Edmund Randolph stated, "there was not a member of the Federal convention who did not feel indignation" at the idea of a standing army. 3 J. Elliot, *The Debates in The Several State Conventions on the Adoption of the Federal Constitution*, 401 (1901) ("Elliot").

absence of emergency or threat to the national security, states were given control over the militia. An essential aspect of the compromise gave the federal government authority to set the "discipline" or standards for training⁵ and the states the authority to conduct the actual training of the militia. The Montgomery Amendment radically departs from the compromise and makes the Framers' promise of state training authority nothing more than empty words.

C. The Framers' Compromise Was Intended To Provide A State Check On Domestic Oppression And Military Adventurism By The Federal Government.

Opponents of absolute federal control over the militia feared centralized military authority. They feared that

⁵ The debates at the Constitutional Convention made clear that "discipline" pertained to "prescribing the manual exercise evolutions, etc." S. Doc. No. 695, 64th Cong., 2d Sess. 35 (1917) ("The Militia"). See also Weiner, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 214 (1940) (early militia legislation used "discipline" to mean a "system of drill"). In 1902, a Congressional Report analyzing the debate at the Constitutional Convention explained the Framers' understanding of the term "discipline" as:

[T]he tactics or drill regulations of the different arms or corps, and such other books and manuals as are provided for the instruction of troops; the purpose being to secure uniformity and training in the militia of the several States, and at the same time to reserve to the States and Territories, respectively, the duty of training or disciplining their militia in accordance with the methods prescribed by Congress or by the President under its authority and direction.

H.R. Rep. No. 1094, 57th Cong., 1st Sess. 19 (1902).

such unhindered authority would lead to domestic oppression by the federal government, and the possibility of expensive, unpopular federal military adventurism.

Opponents of absolute federal control over the militia voiced specific fears during ratification debates⁶ that under the Framers' compromise whole states could be put under martial law,⁷ that the federal government could call out the militia to oppressively exercise routine police powers,⁸ and that federally controlled militia could invade the states.⁹ Federal control over the militia was characterized as an "instrument of oppression"¹⁰ that could "enslave the States" and lead to a "system of despotism."¹¹ They feared that absolute federal control

⁶ Ratification debates conducted through *The Federalist* and in state ratification conventions are a guide to the intended meaning of the Constitution. See, e.g., *Transportation Co. v. Wheeling*, 99 U.S. 273, 280 (1878) (Federalist Papers) and *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) (state ratification conventions).

⁷ See *The Maryland Journal* (No. 1021, March 18, 1788) (Luther Martin expressing the concern that Congress will "subject the freedom of a whole state to martial law and reduc[e] them to the situation of slaves."). See Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cinn. L. Rev. 919, 927 (1988) ("Hirsch").

⁸ 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 283 (1901) ("Elliot") (Clay at Virginia Convention).

⁹ *The Federalist* Nos. 29 and 46.

¹⁰ See *Pennsylvania and the Federal Convention* 598 (McMaster and Stone ed.).

¹¹ *The Militia* at 31. (Gerry at Federal Convention).

over the militia would cause the states to "pine away to nothing"¹² as Congress inevitably exercised "military coercion."¹³

In response to critics, the Framers made clear that the compromise they struck at the Convention provided for state control over the militias as a check against the possibility of federal oppression. As Madison stated, in *The Federalist No. 46* (Cooke at 321):

Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Federal government; still, it would not be going too far to say that the state governments with the people on their side would be able to repel the danger. . . . To these [a standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

Similarly, Hamilton in *The Federalist No. 29* (Cooke at 184-85) stated that the militia, while not precluding the need for a standing army, was "the best possible security against it, if it should exist."

The Framers also believed that state control over the militias was designed as a check on federal military adventurism. During the Ratification debates, critics of

¹² *Id.* at 33.

¹³ 3 Elliot, *supra* n.8, at 387 (Henry at Virginia Convention).

the compromise questioned whether the proposed militia clause allowed the federal government to abuse its military power by sending citizens far from home for indefinite periods in furtherance of military schemes objectionable to the states.¹⁴

In response, the Framers made clear that the federal government would only send the militia far from home in exigencies, such as when invasion or rebellion was threatened, or when there was a need to execute the laws. See *The Federalist No. 29*. Court of Appeals Dissenting Opinion at A-23. In normal times, the Framers asserted, the states and the people would assure that the federal government did not abuse its control of the militia. Hamilton emphasized that the militia were under "the preponderating influence" of the states. *Id.* (Cooke at 185). Thus, he continued, "what shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them in the same feelings, sentiments, habits, and interests?" *Id.* Hamilton concluded that if the federal government attempted to send state troops on such adventures, its actions would be based not on authority granted in the Constitution but rather on "imagined entrenchments of power." *Id.* (Cooke at 186). He believed that the states and the people would not countenance such clear violations of the law.¹⁵ See Court of Appeals Dissenting Opinion at A-23.

¹⁴ See Letter of Luther Martin in the Maryland Journal, March 18, 1788, reprinted in *The Militia*, *supra* n.5 at 119; see also remarks of Luther Martin before the Maryland House of Representatives, November 20, 1787, *id.* at 117-18. Similar fears were also expressed at the Pennsylvania ratifying convention. See *Pennsylvania and the Federal Convention* 598 (McMaster and Stone ed.)

¹⁵ See *The Federalist No. 29* (Cooke at 186) (emphasis added) where Hamilton stated that if the central government
(Continued on following page)

Similarly, Madison declared that the authority of the states "as co-equal sovereigns," together with the political power of the people, would form a significant check on the potential use of state militia for military adventurism by the federal government. He stated:

- Can we believe that a government of a Federal nature, consisting of many co-equal sovereigns, and particularly having one branch chosen from among the people, would drag the militia unnecessarily to an immense distance. This, sir, would be unworthy of the most arbitrary despot. They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, and drawing on them the general hatred and detestation of their country.

3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 381-82 (1901) ("Elliot"). See Court of Appeals Dissenting Opinion at A-24. The reserved state authority over militia training provided by the Constitution was intended by the Framers to serve as a check by the states on the abuse of military power by the federal government. The Montgomery Amendment removes a fundamental part of the check and thereby violates the Framers' intent.

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attempted such an abuse, "whither would the militia, irritated by being called upon to undertake a distant and distressing expedition for the purpose of rivetting the chains of slavery upon a part of their countrymen direct their course, but to the seat of the tyrants who had meditated so foolish as well as so wicked a project; to crush them in their imagined entrenchments of power, and to make them an example of the just vengeance of an abused and incensed people?"

D. The Second Amendment And The Guarantee Of Republican Government Clause Also Demonstrate That Reserved State Authority Over The Militia Was Designed As A Check On The Abuse Of Federal Military Power.

The Second Amendment to the Constitution provides:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const., amend. II.

The preamble to this amendment makes clear that it was intended to reassure states' rights advocates who feared that the power of a large, federal standing army would diminish the "security of a free state." See discussion of *The Federalist* Nos. 29 and 46, *supra* at 20. The Second Amendment guaranteed the perpetual existence of a viable militia as a continued check on the military power of the federal government.¹⁶ As the Supreme Court stated, "With the obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. [The Second Amendment] must be interpreted and applied with this in view." *United States v. Miller*, 307 U.S. 174, 178 (1939).¹⁷ See Court of Appeals Dissenting Opinion at A-26. The Montgomery

¹⁶ The Second Amendment also nullified article I, § 10, which allowed Congress to deny states the prerogative of keeping troops in peacetime. See Note, *Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters*, 39 Case W. Res. L. Rev. 165 (1988-89) ("Note").

¹⁷ For further evidence supporting this view of the Second Amendment, see 1 *Annals of Congress*, 749-52, 766-67 (J. Gales,

(Continued on following page)

Amendment, which allows the militia to become a federal force at will, violates the terms of the Second Amendment.

The principle that state control over the militia was an explicit check against the abuse of federal military power was also made clear in the debates over the Guarantee of Republican Government Clause. U.S. Const., art. IV, §4. That clause gave the federal government power to suppress domestic violence in the states. Many delegates believed this power, together with federal power over the militias in clauses 15 and 16, could create unchecked federal military power. Responding to such fears at the Virginia convention, Madison made clear:

I cannot agree . . . that [in the Constitution] there is no check [on the federal military powers]. There is a powerful check in that paper. The state governments are to govern the militia when not called forth for general national purposes; and the Congress is to govern only such part of them as may be in the actual service of the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the service of the United States. It is, then, clear that the States govern them when they are not.

3 Elliot, *supra*, at 424.

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ed. 1789); 1 S. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia*, App. 300 (1803); 3 J. Story, *Commentaries on the Constitution of the United States*, §§ 1890-91 (1833); Note, *supra* n.16, at 175-77.

E. The Framers Did Not Intend To Restrain Federal Authority Over The Militia During A National Emergency.

Although the framers clearly intended the militia clauses to serve as a check on the abuse of the military power by the federal government, they also believed that the federal government's power over the military, specifically the power to raise armies, should be unquestioned by the states when the national security was threatened. Hamilton believed that the militia power was a fundamental check by the states on federal militia power and that the states were to have a "preponderating influence over the militia." *The Federalist No. 29* (Cooke at 185). However, he also believed that in the context of "national exigency" or "circumstances that endanger the safety of the nation," that the army power was to "exist without limitation." *The Federalist No. 23* (Cooke at 147).

Similarly, Madison declared that the state controlled militia was the best way to protect against a standing army and federal military adventurism. *The Federalist No. 46* (Cooke at 185). However, he also believed that the federal government's authority would be "most extensive in times of war and danger." *The Federalist No. 45* (Cooke at 321). (J. Madison). Madison further recognized the need "to give the general government the full power to call forth the militia and exert the whole national strength of the union, when necessary." 3 Elliot, *supra*, at 381. Similarly, George Washington, in a speech to Congress in 1793, proposed that the militia, under the new Constitution, would be prepared "for every military exigency of

the United States." 12 J. Sparks, *The Writings of George Washington* 39 (1839) (emphasis added).¹⁸

The Framers, in reserving the authority of training the militia to the states, made a considered express structural decision ordering federal and state roles in governing the militia under civilian authority. The Court of Appeals did not consult the Framers' intent. If it had, it could not have upheld the Montgomery Amendment on the basis that the militia training clause is subordinated to the army clause at will. The Framers' intent is clear: absent a declared national emergency, the states were reserved express authority to train the militia.

III. THE MONTGOMERY AMENDMENT ABANDONS A CONSISTENT CONGRESSIONAL UNDERSTANDING THAT THE STATES CONTROL THE NATIONAL GUARD IN THE ABSENCE OF A NATIONAL EMERGENCY.

The Montgomery Amendment marks a departure from careful observance of the constitutionally mandated state character of the militia by Congress. As in many other fields, the federal government, through the carrot of funding and the stick of compliance regulations, has gradually increased its *de facto* control over state National

¹⁸ Because the new nation was small and generally of isolationist sentiment, the three contingencies specified in clause 15 (insurrection, execution of the laws and invasion) may not have been intended to be exclusive, but rather indicative of the gravity of circumstance that would allow for federal control of state militias. See *Martin v. Mott*, 25 U.S. (12 Wheat) 19 (1827) (using the concept of "exigency" or threat to the national security interchangeably with the contingencies specified in Clause 15.) See Hirsch, *supra* n.5, at 930-42.

Guard units. Until the enactment of the Montgomery Amendment in 1956, however, Congress always explicitly recognized and protected state rights insured by the militia clauses of the Constitution.

In 1790, Secretary of War Henry Knox proposed a plan to organize the militia that "depended for its operation on extensive intervention by the United States into the affairs of the militia, affairs of which the states were then jealously possessive. As might be expected, therefore, it was defeated." W. Riker, *Soldiers of the States: The Role of the National Guard in American Democracy* 19 (1957). Congressional debate over the Knox proposal reflected Congress' understanding of the express nature of the reserved state authority over the militia. See *The Militia, supra*, at 123 (Remarks of Sherman).

The Dick Act, Act of January 21, 1903, ch. 196, 32 Stat. 775, began the process of increased federal supervisory control in exchange for grants-in-aid. In this act, Congress strictly differentiated between the "unorganized militia" of all men between certain ages, which existed only in name and principle, and the "organized militia," termed by the act the National Guard, which was the *actual* state militia. The Dick Act carefully observed state interests by forbidding the issuance of arms or assigning regular army officers to state guard units until state governors had requested such assistance. *Id.* at 777. It also prohibited joint encampments or maneuvers between the National Guard and the army unless the governors made a formal request. *Id.* at 777-78.

The National Defense Act of 1916, ch. 134, 39 Stat. 166 ("The 1916 Act"), continued the effort to further federal "organizational" control over state National

Guards. It provided, however, that "nothing contained in this act shall be construed as limiting the rights of the states and territories and the use of the National Guard within their respective borders in time of peace . . ." 39 Stat. at 198 (codified at 32 U.S.C. § 109(b)). The 1916 Act also declared that sentences of dismissal or dishonorable discharge from the National Guard must be approved by the governors of the respective states before they were effective. 39 Stat. at 209.

The National Defense Act Amendments of 1933, Act of June 15, 1933, ch. 87, 48 Stat. 155, were designed to remedy mobilization problems that had occurred during World War I. National Guard units, which were in a relatively high state of readiness, were disbanded and its members had to be drafted individually. The 1933 Act remedied this problem by allowing the federal government to mobilize National Guard units intact "so as to eliminate the delay incident to draft." S.Rep.No. 135, 73d Cong., 1st Sess. 2 (1933). To accomplish this goal, Congress created the "dual enlistment system." Dual enlistment required members of state National Guard to be concurrent members of a new entity called the National Guard of the United States ("NGUS").¹⁹ The NGUS was a reserve component of the United States Army created under the authority to raise and support armies. Based on this dual status, the 1933 Act gave the president power to order the National Guard in its status as the NGUS into federal service, but only in a "national emergency" declared by Congress. The House and Senate reports

¹⁹ See, e.g., 10 U.S.C. §§ 101(11) and (13), 261(a)(1) and (5), 269(b) (1988).

accompanying the 1933 Act indicate that in the absence of a national emergency, control over the militia or National Guard remained absolutely with the states. See S. Rep. No. 135 at 2; H.R. Rep. No. 141, 73rd Cong., 1st Sess. at 5. See *infra* at 37-39. See Court of Appeals Dissenting Opinion at A-44-45.

In 1952, Congress recodified all provisions of the United States Code relating to reserve components of the armed services. See Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 ("1952 Act"). Section 233 of the 1952 Act for the first time relied on the army power of the Constitution to bring the National Guard into federal service for training. Respecting the clear terms of the militia clauses of the Constitution, however, the Act explicitly required the federal authority requesting National Guard participation to first obtain the consent of the relevant state governors. See 10 U.S.C. § 672(b) and (d).²⁰

Congress rejected an earlier version of the 1952 Act, which omitted the gubernatorial consent provision, after National Guard spokesmen and others pointed to the militia clauses. General Ellard A. Walsh, speaking for the National Guard Association, declared that without the gubernatorial consent requirement the bill

concentrat[ed] too much power in the Executive and too much authority in the Department of

²⁰ In this light, the United States Military Court of Appeals found that the gubernatorial consent requirements of the statutes "has constitutional underpinnings in art. I, section 8 of the Constitution of the United States." *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977) (footnote omitted); accord *United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1982); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978).

Defense, and would in a number of instances infringe not only on the authority of the sovereign states but of the Congress as well.

He also stated the absence of a gubernatorial consent provision

very definitely violates the provisions contained in the militia clauses of the Federal Constitution, and notably article I, section 8, clause 16 thereof, which reserves to the States the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

Court of Appeals Dissenting Opinion at A-48 n.26 (quoting *Reserve Components: Hearings on H.R. 4860 Before the Committee on Armed Services*, 82d Cong., 1st Sess. 473, 482-83 (1951)). Similarly Ernest Vandiver, Adjutant General for the State of Georgia, complained that the proposed bill "will delegate to the Pentagon the constitutional rights and powers imposed in the governors of the respective states to command their militia." *Id.* (quoting *Armed Forces Reserve Act: Hearings on H.R. 5426 Before the Senate Subcommittee on Armed Services*, 82d Cong., 2d Sess. 312 (1952)).

Throughout the statutory changes increasing *de facto* federal control over the National Guard, the Congress, until enactment of the Montgomery Amendment, never threatened the explicit state reserved authority for militia training provided by the militia training clause.

The Montgomery Amendment was enacted in 1986 after the Governor of Maine refused to allow forty-eight members of the Maine National Guard to participate in a training mission in Honduras and several other governors threatened to follow suit. Court of Appeals Dissenting Opinion at A-49-50 (citing *Hearings on Federal*

Authority Over National Guard Training Before the Subcommittee on Manpower & Personnel of the Senate Committee on Armed Services, 99th Cong., 2d Sess. (1986) (stenographic transcript) (1986 Senate Hearings)). In response, a subcommittee of the Senate Committee on Armed Services considered the question of abolishing the gubernatorial consent provisions in the 1952 Act. After hearings called on short notice, the subcommittee took no action.²¹ One month later in the House, Representative G.V. Montgomery of Mississippi submitted an amendment to a Defense authorization bill. *Id.* at A-51. The proposed Montgomery Amendment prevented a governor from withholding consent for an active duty mission outside the United States because of his or her objections to "location, purpose or schedule of the mission." *See* Cong. Rec. H. 6267 (daily ed. at August 14, 1986). In essence, the proposed Montgomery Amendment nullified the gubernatorial consent provisions of the 1952 Act.

Because Rep. Montgomery's proposal was an amendment to a defense authorization bill, debate was limited to ten minutes. There were no hearings before the amendment reached the floor for a vote. Several representatives objected to such a significant change in defense policy, and the constitutional balance of power, without the benefit of hearings, *see id.* at H. 6263-68 (Remarks of Reps. Edwards and Schroeder), and with limited debate. *Id.* at

²¹ At the hearing, 22 governors expressed their objection to the proposal, including Governor John H. Sununu of New Hampshire who stated that the "legislative initiative is directly contrary to the language and intent of the U.S. Constitution." For a more extensive discussion, *see* Court of Appeals Dissenting Opinion, A-49, A-50.

6266-67 (Remarks of Rep. Dyson and Schroeder). Consideration of the amendment was further overshadowed by warnings that if the House did not act quickly to eliminate the gubernatorial consent requirement, the federal government would eliminate state National Guard funding. See Remarks of Rep. Montgomery, Cong. Rec. at H.6267; see also Testimony of James H. Webb, Jr., 1986 Senate Hearings, *supra* at 5-14; H.R. Rep. No. 718, 99th Cong., 2d Sess. 176 (1986) ("Webb Statement"); J.A. 27. The amendment was enacted and, after one technical change, the Senate conferees acquiesced. Legislative History of Pub. L. No. 99-661, 99th Cong., 2d Sess. 475 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 6413, 6534 (National Defense Authorization Act For Fiscal Year 1987) ("Legislative History").

With passage of the Montgomery Amendment, a fundamental reservation of power to the states, existing in the explicit text of the Constitution, supported by the historical intent of the Framers, and respected by Congress for one hundred and ninety-nine years, was eliminated in ten minutes.

IV. THE COURT OF APPEALS MISINTERPRETED THE SELECTIVE DRAFT LAW CASES AND THE CONCEPT OF DUAL ENLISTMENT.

In upholding the Montgomery Amendment, the court of appeals relied on this Court's decision in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and on the concept of "dual enlistment" as mandated in the National Defense Act Amendments of 1933. The court of appeals misinterpreted both and, as a result, nullified the militia training clause.

A. The Selective Draft Law Cases Addressed Only The Constitutionality Of Wartime Conscription And Suggested State Control Over The National Guard Absent A National Exigency.

The *Selective Draft Law Cases* addressed challenges to the constitutionality of a wartime conscription act. See The Selective Draft Law of May 18, 1917, ch. 15, 40 Stat. 76. This Court held that wartime conscription was not prohibited by the terms of the militia clauses. 245 U.S. at 381-82. These cases involved Congress' exercise of its war powers,²² were reviewed in the context of a world war and not peacetime, involved challenges by ordinary citizens not by the organized militia or National Guard, and did not involve the *training* of the militia, a right explicitly reserved to the states in the Constitution. The *Selective Draft Law Cases* do not in any respect control the issue before this Court.

The Selective Draft Law of 1917 warned that the country in the context of a declared war was faced with "an emergency which demands the raising of troops in addition to those now available." 40 Stat. at 76. Authority for the law, according to this Court, lay in the powers to declare war, to raise and support armies, to make rules for land forces, and the necessary and proper clauses. 245 U.S. at 377. The challenged provision gave Congress the authority to conscript citizens between the ages of 21 and 30 to serve in the federal army for the "then existing

²² The war power has been used by this Court to refer to all the military powers found in article I, § 8 and article II, § 2 of the Constitution. See *Lichter v. United States*, 334 U.S. 742, 758 (1948); *Hamilton v. Kentucky Distilleries*, 251 U.S. 146 (1919).

emergency." 40 Stat. at 76. This provision did not involve, in any sense, the organized militia or the National Guard. The power to draft members of the organized militia or National Guard, referred to by both the Court and the statute at issue, was controlled by a wholly separate provision. See The National Defense Act of 1916, ch. 134, § 111, 39 Stat. 166.²³

Appellants in the *Selective Draft Law Cases* were not members of the organized militia or the National Guard governed by 39 Stat. 166, but merely American citizens between the ages of 21 and 30. 245 U.S. at 376; Brief for the United States in the *Selective Draft Law Cases* at 3, 60. From early in the history of the Republic, Congress has provided that all males between certain ages were members of the militia. See Act of May 8, 1792, 1 Stat. 271. Beginning in 1903, however, Congress strictly differentiated between the "unorganized militia" of all men between certain ages, which existed only in name and principle, and the "organized militia" or the *actual* state militia troops which became known also as the National Guard.

Appellants in the *Selective Draft Law Cases* argued that the militia federalization clause allows the militia to be called forth only to execute the laws, suppress insurrections or repel invasions. Hence, as members of the

²³ In *Ex parte Dostal*, 243 F. 644 (N.D. Ohio 1917), an Ohio federal district court upheld the constitutionality of 39 Stat. 166, § 111, as permissible "in view of the then existing emergency."

unorganized militia, they argued that the Constitution prohibited the federal government from calling them into federal service for a foreign war. The Court rejected this claim finding that appellants' position logically prevented Congress from *ever* raising an army to fight a foreign war. 245 U.S. at 377-78.

The Court's opinion also suggested plenary federal power over the militia or National Guard in time of national exigency or emergency. In describing the interplay between the "military" or "army" powers and militias clauses, the Court found that, in order to remedy an unworkable aspect of the Articles of Confederation,²⁴ the Constitution delegated the states' power to call forth the militia to Congress. However, the Court continued, the superseding authority of the "army power" or the "military power" to call forth the militia was specifically confined to "exigencies." The Court stated:

[t]he duty of exerting the [military] power thus conferred in all its plenitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the *exigencies* which would call it in part or in whole into play.

Id. at 382-83 (emphasis added).

In the absence of a "strict necessity" or exigency and congressional use of the military power, the Court

²⁴ Under the Articles of Confederation, the states had the power to call forth their militias and the central government only the authority to request quotas of troops. This proved unworkable because the states could resist or delay in responding. See *Selective Draft Law Cases*, 245 U.S. 366, 380-81 (1918).

suggested that the states, under the militia clauses, controlled the training of these militias. In this light, the Court declared that the militia power of the states

diminished the occasion for the exertion by Congress of its military power beyond the *strict necessities* for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) *although leaving the carrying out of such command to the states.*

Id. at 383 (emphasis added).

A proper construction of the interplay between the army and militia clauses should not confuse their separate areas of authority "to the end of confusing both the powers and thus weakening or destroying both," the Court added. *Id.* at 384. The court of appeals, by subordinating the militia training clause to the army clause in the absence of war or exigency, departed from this Court's understanding of the interplay between the two clauses.

The court of appeals erred in construing this Court's holding in the *Selective Draft Law Cases* to extend beyond times of war or even exigency. A-10. It maintained that the *Selective Draft Law Cases* stand for the proposition that the army power supersedes at will the states' reserved authority over the organized militia or National Guard. A-10-12. Clearly, however, the opportunity for such a decision was not before the Court in the *Selective Draft Law Cases*. The question before it was the far narrower one of whether the militia clauses prevented Congress from conscripting ordinary citizens, not members of the

organized militia or National Guard, during a declared war. To the extent that the baroque language of Chief Justice White can be given a broader meaning than this, it is *dicta*. Further, any construction of the *Selective Draft Law Cases* which provides that the army clause can supersede the states' reserved authority over the militia at will is both contrary to the clear terms of the Constitution, the historical intent of the Framers, and the consistent understanding of Congress.

B. The Concept Of Dual Enlistment Cannot Negate Reserved State Authority Over Training The Militia.

The court of appeals found that the "dual enlistment" concept created in the National Defense Act Amendments of 1933 transformed the character of state National Guard members by placing them at the disposal of the federal government at all times.²⁵ This finding is fundamentally incorrect. The dual enlistment system did require state guardsmen to concurrently become members of a new army reserve organization, the National Guard of the United States.²⁶ But the 1933 Act did not change the state character of the National Guard and, in fact, allowed the

²⁵ See Act of June 15, 1933, ch. 87 § 5, 48 Stat. 155; Court of Appeals Opinion, A-10; District Court Opinion, A-149-50, see also *Dukakis v. United States Department of Defense*, 686 F.Supp. 30, 36 (D.Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub nom., Massachusetts v. United States Department of Defense*, ___ U.S. ___, 109 S.Ct. 1743 (1989).

²⁶ It is important to note that the National Guard of the United States does not exist apart from the state National Guards. It is not in any sense a separate reserve with separate membership.

federal government to order these reserves to active duty only in an *emergency* declared by Congress. Through dual enlistment, Congress did nothing more than *formalize* the existence of federal power over the militia in an exigency as intended by the Framers and as recognized by this Court in the *Selective Draft Law Cases*. The 1933 Act enabled federal mobilization of the National Guard in units during an emergency, but did not alter the state's responsibility for training.

Acknowledging this reality, the Senate Report accompanying the 1933 Act stated that "control, officering, and discipline [of the National Guard] except when ordered out pursuant to an emergency declared by Congress, [is left] with the respective States, just as at present. The relation of the guard to the respective States during peace is in no wise affected or altered." S.Rep. No. 135 at 2. According to the House Report, the 1933 Act "reserv[ed] to the states their right to control the National Guard or the organized militia *absolutely* under the militia clause of the Constitution in time of peace." H.R. Rep. No. 141 at 5 (emphasis added).

As with a variety of federal/state joint ventures, the carrot of federal funding, together with the stick of federal compliance regulation, can exert a profound and controlling influence over state actions. Speed limits, drinking ages, the development of roadways and power projects, the basic policies of hiring practices of state agencies and universities, among many others, can be subject to an almost *defacto* federal supervision. This *defacto* legislative power, however, cannot nullify the express terms of the Constitution.

Congress, and the federal government, no matter how well intentioned, no matter how much more efficient the result might be, cannot simply call the militia a different name and subject it to plenary federal control. As the court of appeals dissent concluded:

Federalism is not yet meaningless. It remains a vital element in our constitutional system, both as a check on the unwise use of central power and a bulwark of the freedom that derives from local autonomy. In this light it is undeniable that fundamental powers given to the States explicitly in the constitution—whether these powers concern civil rights, property rights or state militias—cannot in the absence of the formal amendment process be rendered a legal nullity by the sheer force of a political expediency.

Court of Appeals Dissenting Opinion at A-61.

The court of appeals found support for its conclusion that the dual enlistment system gives the federal government plenary control over the National Guard in the cases of *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969) and *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968). Court of Appeals Opinion at A-10; District Court Opinion at A-150. In both cases, members of the National Guard challenged the constitutionality of a presidential order to active duty under Public Law 89-687, which provided the President with temporary authority, based on the determination of presidential necessity, to order a member of the National Guard to active duty for up to twenty-four months. This statute was enacted after passage of the Gulf of Tonkin Resolution, see Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964), pursuant to the "war powers" of Congress, *Phile v. Corcoran*, 287 F. Supp. 554, 561 (D. Colo. 1968).

The guard members in both cases alleged *inter alia* that because the duty did not fall within the prescribed purposes under the militia federalization clause, the order to active duty was unconstitutional. The *Johnson* and *Drifka* courts upheld the statute under the army power and the necessary and proper clause.

The constitutionality of the prescribed order to active duty is not questioned here. The orders were issued under the authority of the Gulf of Tonkin Resolution and pursuant to the war powers of Congress. However, to the extent that *Johnson* or *Drifka* can be read to suggest that (1) the *Selective Draft Law Cases* held that the army power supersedes the militia power at will when national exigency is present or (2) that the dual enlistment system in some way nullifies or circumvents reserved state authority embodied in the militia clauses, they are in error.

V. THE MONTGOMERY AMENDMENT UNNECESSARILY NULLIFIES THE MILITIA TRAINING CLAUSE.

The Montgomery Amendment clearly nullifies the militia training clause in the name of exercising army clause power, thereby violating the principle that constitutional provisions are to be construed harmoniously. It is unnecessary to nullify an express constitutional reserved power in order to protect the nation because the National Guard can be federalized for any national emergency. Respondents' policy concerns regarding the level of readiness of the nation's defense and the authority to conduct foreign policy are unsupported and cannot justify elimination of an express state power.

A. The Militia Training Clause Is Nullified By The Montgomery Amendment.

The Montgomery Amendment provides that governors are prohibited from withholding consent under 10 U.S.C. § 672(b) and (d) for overseas peacetime duty of the National Guard if the reasons for the objection is the "location, purpose, type, or schedule" of the duty. 10 U.S.C. § 672(f). The Montgomery Amendment clearly eliminates the intended role of the states as a check on the abuse of federal military power. Moreover, even the notation on legislative intent suggesting governors can withhold consent in local emergency is illusory.²⁷ Minnesota has approximately 13,000 members of the National Guard. At most, only several hundred will be in federal training at any one time. To suggest that a governor will ever be able to withhold consent under the Montgomery Amendment assumes (1) local emergencies can be adequately predicted in advance, and (2) a governor can persuade federal authorities that National Guard members designated for training are needed for state purposes when the overwhelming majority of the National Guard remains at home. When viewed in this light, it is clear that the restrictions placed on governors consent in the Montgomery Amendment nullifies the militia training clause.

Without gubernatorial authority to withhold consent to National Guard training missions outside the United States when there is no national emergency, the constitutionally reserved state authority over training is made "shadowy and insubstantial," *Prigg v. Pennsylvania*, 41

²⁷ See Legislative History, *supra*, at 32.

U.S. (Pet.) 539, 612 (1842), and unnecessarily subordinated to the Army clause. The army and militia training clauses should be construed harmoniously. Instead, the court of appeals construction "weakens or destroys" the militia training clause, contrary to this Court's warning in the *Selective Draft Law Cases*, 254 U.S. at 384.

Clearly, if the integrity of the militia clauses are to be preserved, there has to be a line over which the federal Government cannot cross with its army power.²⁸ That line is indicated by the words of the Constitution, the intent of the Framers, the Supreme Court's deliberations and the considerations of a deliberative Congress in the 199 years prior to 1986. That point is a "national exigency" or "national emergency."

B. The Montgomery Amendment Is Unnecessary Because The National Guard Can Be Federalized In A National Emergency.

The militia training clause, properly construed, does not interfere with training or any other aspect of national defense. It merely requires Congress or the President to

²⁸ Even the Massachusetts District Court, which upheld the Montgomery Amendment, recognized that accepting the respondent's position at face value would lead to the abolition of the militia by transforming it into a part of the army. *Dukakis*, 686 F. Supp. at 36. That Court acknowledged that there must be a line of reserved state authority over which the federal government cannot cross. Unfortunately, the Court neither explained where that line is nor why it believed the Montgomery Amendment fell on the permissible side of the line.

declare a national emergency before invoking the army clause to send state National Guard troops on peacetime training missions. The national emergency requirement is both principled and practical. It is principled because it effectuates the Framers' intention to reserve militia training authority to the states to the extent it does not hamper the national defense in an emergency. It is practical because it unleashes without reservation the army power whenever required by the national interest.

James Madison considered that the federal government's authority would be "most extensive in times of war and danger." *The Federalist No. 45* (Cooke at 313). Alexander Hamilton, writing of the army clause, stated that because it was impossible to foresee future "national exigencies," or "circumstances which may affect the public safety," "there can be no limitation of that authority which is to provide for the defense and protection of the community. . . ." *The Federalist No. 23* (Cooke at 147-48). However, Hamilton also argued that the federal-state balance provided in the Constitution was designed to permit the emergence of strong militias independent of federal control to effectively counter a standing federal force. *The Federalist No. 29* (Cooke at 184-85). The Framers' conception of the army clause providing unlimited federal authority to provide for the national defense counterposed with a state militia able to resist federal authority requires state sovereign interests to be respected in peacetime absent a threat to the national security.

The Presidential and Congressional powers to authorize peacetime National Guard training without state consent in a national emergency, like the express power to federalize the militia under the federalization clause, is

"to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." *Martin v. Mott*, 25 U.S. 19, 30 (1827).

It is questionable whether the basis of a declaration of a national exigency for the purpose of authorizing peacetime National Guard training without state consent can be challenged because to do so "might reveal important secrets of State, which the public interest, and even safety, might imperiously demand to be kept in concealment." *Id.* at 31; see also *Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The national exigency exception to state authorization of peacetime militia training assures the nation that no state's objections to peacetime National Guard training will jeopardize national security interests.²⁹

The Montgomery Amendment is an unnecessary and sweeping abridgment of state militia training authority. Adherence to the plain meaning of the militia training clause and the Framers' intent does not handcuff federal military powers in emergency circumstances.

C. The Montgomery Amendment Cannot Be Justified On Policy Grounds.

The Montgomery Amendment is an unnecessary abridgment of state reserved authority. It cannot be

²⁹ The states, no less than the federal government, "are interested in the safety of the United States, the strength of its military forces, and its readiness to defend them in war and against every attack of public enemies. . . ." *Hamilton v. Regents of the University of California*, 293 U.S. 245, 260 (1934).

justified as a measure required by defense or foreign policy considerations.

1. Claims that reserved state training authority adversely affects the national defense are unsupported.

A proper harmonization of the army and militia training clauses permits the federal government to quickly assume total and unreviewable control of the National Guard by declaring a national emergency. In any situation demanding quick action, there would be no state-imposed obstacles to hinder—in any sense—the federal government's immediate response.

There is no evidence that the absence of the Montgomery Amendment before its enactment hampered the nation's defense in any way. No governor has ever objected to missions designed to train the National Guard for defending the nation. As the respondent Chief of the National Guard Bureau³⁰ advised Congress in 1986:

[N]o governor has said he opposes overseas deployment training—all have said they wholeheartedly believe in it and understand and support the need for it.

Court of Appeals Dissenting Opinion at A-56 (quoting 1986 Senate Hearings at 95-5).

³⁰ The National Guard Bureau is a government agency serving as the channel of communication between federal and state military authorities. 10 U.S.C. § 3040 (1988).

No governor ever withheld consent to a training mission for any reason prior to 1986. The states have never opposed training on the basis of terrain or climate. The states have never opposed the principle of guard exercises coordinated with regular forces. In short, the states have never opposed the substance or content of training—nor are they likely to do so in the future. *Id.*

The controversy in this case began when the national government began to use statutory training provisions for purposes that were perceived to be other than training. In 1983, National Guardsmen participated in the Grenada mission, Pet. for Rehearing and Suggestion For Rehearing En Banc at 6, apparently while on federal "training" duty. Note, *Should I Stay Or Should I Go: The National Guard Dances To The Tune Of Two Masters*, 39 Case W. Res. L. Rev. 165, 209 (1988-89). In 1986, National Guard members from Washington while on a three week "training" mission were used in the bombing raid on Libya. *Id.* at 208; Court of Appeals Dissenting Opinion at A-60 and n.35. Finally, in 1986 and 1987, Minnesota and other state National Guardsmen were sent to politically sensitive Honduras for training and other purposes. Complaint, para. 17, J.A. 6; Webb Statement, J.A. 20.

If the Honduran training controversy is typical of the practical dangers this country faces in the absence of the Montgomery Amendment, there is no policy justification for the statute. Gen. La Verne Weber (retired), former Chief of the National Guard Bureau, told Congress that the Honduran controversy had little effect on overall guard training operations. Court of Appeals Dissenting Opinion at A-57 n.33 (citing Weber testimony). General

Walker of the National Guard Bureau, testified that during the midst of the Honduran training controversy a total of 48 people were prevented from training in Honduras. *Id.* at A-59 n.34 (citing Walker testimony). He noted that these 48 people constituted .0001 percent of the total deploying force, less people than report to sick call on an average base on a given day, less people than have had to forego scheduled training for employer's support reasons and less people than have had to forego participation due to other commitments. *Id.*

Clearly, respondents' contention in the courts below that continued adherence to the reserved state training authority will severely hamper our nation's defense is unsupported. The federal government can quickly overcome any state-imposed hinderance by declaring a threat to the national security and federalizing the National Guard.

2. Claims that state consent for National Guard training improperly affects foreign policy are unsupported.

Respondents have also argued in the courts below that the reserved state training authority impermissibly permits governors to conduct "foreign policy." As a practical matter, this concern is also unsupported. The mere power to withdraw consent to an overseas training mission can hardly be considered "conducting foreign policy."

The Framers did not, of course, intend the states to make positive national policy in the area of defense or

foreign relations matters.³¹ However, they did intend the states, through their control over state militias, to serve as a check on the abuse of federal military power.

Even though "[p]ower over external affairs is not shared by the States," *United States v. Pink*, 315 U.S. 203, 233 (1944), restraints on the federal government are not waived simply because a constitutionally protected activity may have an indirect effect on foreign policy. Thus, the First Amendment is not nullified by the federal government's interest in protecting the dignity of foreign missions, *Boos v. Barry*, 485 U.S. 312, 329 (1988). See also, *Reid v. Covert*, 354 U.S. 1, 16 (1957) (neither treaty nor executive agreement "can confer power on the Congress . . . which is free from the restraints of the Constitution."); *DeGeofroy v. Riggs*, 133 U.S. 258, 267 (1890) (suggesting that federal government may not by treaty deny state a republican form of government); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1871) ("treaty cannot change the Constitution").

Thus, if the states' reserved authority for training indirectly in some way affects foreign policy, it is a permissible effect. In the past, this authority has not affected foreign policy any more than a vigorous national public debate. It is unlikely to do so in the future.

CONCLUSION

The court of appeals decided that Congress has unlimited authority to disregard the militia training

³¹ See U.S. Const., art I, § 10, cls. 1, 3.

clause at any time, for any reason, and for any duration. An express reserved state power, so rarely granted in the Constitution, no longer has any meaning. Such a decision has far-reaching and unwise consequences. It means simply that the National Guard can be permanently federalized and that the essential state character of the National Guard as we know it today can be eliminated. Such a result is clearly contrary to the plain meaning of the Constitution, the Framers' intent in drafting the Constitution, and the consistent understanding of the Constitution over 200 years. A far better result is one that harmonizes all clauses of the Constitution, observes to the Framers' intent, limits federal training authority over the National Guard, and permits federalization when the national security is threatened. Petitioners respectfully urge this Court to reverse the decision of the court of appeals holding that the Montgomery Amendment is constitutional.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Army Clause (Art. I, § 8, cl. 12) provides:

[The Congress shall have Power] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; * * *.

The Militia Clauses (Art. I, § 8, cls. 15 and 16) provide:

[The Congress shall have Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *.

10 U.S.C. 672(b) and (d) provide:

§ 672. Reserve components generally

* * *

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may

App. 2

not be ordered to active duty under this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

* * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

* * *

10 U.S.C. 672(f), provides:

(f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule such active duty.

(1)
No. 89-542

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the Montgomery Amendment, 10 U.S.C. 672(f), is a constitutional exercise of Congress's plenary authority to provide for the national defense under the Army Clause, U.S. Const. Art. I, § 8, Cl. 12, and thus not violative of the Militia Clauses, U.S. Const. Art. I, § 8, Cls. 15-16, which reserve to the States the authority to train the militia.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-542

RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A62) is reported at 880 F.2d 11. The opinion of the panel (Pet. App. A63-A141), which was vacated by the court of appeals en banc (Pet. App. A62.1), is unreported. The opinion of the district court (Pet. App. A141-A153) is reported at 666 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals (J.A. 31-32) was entered on June 28, 1989. The petition for a writ of certiorari was filed on September 26, 1989, and was granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced as an Appendix, *infra*, 1a-2a.

STATEMENT

This case involves a challenge by the Governor of Minnesota to the constitutionality of the Montgomery Amendment, 10 U.S.C. 672(f). Passed in 1986, that Amendment provides that when members of the National Guard of the United States are ordered to active duty outside the United States, the governor of a State may not withhold his or her consent to such duty based upon the governor's objections to its location, purpose, type or schedule. In passing the measure, Congress relied on the broad powers conferred on it by the Constitution to provide for the Nation's defense and security.

1. The United States Constitution contains a number of provisions conferring authority on Congress to "provide for the common defence" of the nation. U.S. Const. Preamble. Section 8 of Article I grants Congress power "[t]o raise and support Armies" (Cl. 12). Section 8 of Article I also includes provisions giving Congress power "[t]o provide and maintain a Navy" (Cl. 13), "[t]o make Rules for the Government and Regulation of the land and naval Forces" (Cl. 14), and to collect taxes to "provide for the common Defence" (Cl. 1). Other provisions indicate that the power of the federal government in matters of national defense is plenary. Section 10 of Article I provides that "[n]o State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay" (Cl. 3). Article II provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States" (§ 2, Cl. 1). Finally, a number of provisions grant exclusive power to the federal government over the closely related areas of war and foreign relations.¹

¹ See Art. I, § 8, Cl. 11 (Congress's power to declare war); Art. I, § 10, Cl. 1 (States forbidden to enter into treaties); Art. I, § 10, Cl. 3 (States forbidden to enter into agreements with foreign powers); Art. II, § 3, Cl. 3 (President shall receive ambassadors).

In two neighboring clauses in Section 8 of Article I, the Constitution also grants Congress extensive power over "the Militia," while reserving other authority to the States. The first of these clauses—Clause 15—gives Congress the power to "provide for calling forth the Militia" for three specific purposes: "to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]" U.S. Const. Art. 1, § 8, Cl. 15. The second clause—Clause 16—grants Congress the power

[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. Const. Art. 1, § 8, Cl. 16.

Aside from the Militia Clauses, the militia are mentioned in the original Constitution only once: Article II provides that "[t]he President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States." Art. II, § 2, Cl. 1. The Second Amendment also mentions the militia, providing that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

2. a. Congress has exercised its extensive constitutional powers over matters of national defense by establishing the armed forces of the United States, which consist of the Army, Navy, Air Force, Marine Corps, and Coast Guard. 10 U.S.C. 101(4); 32 U.S.C. 101(2). Each of these services has a reserve component, 10 U.S.C. 261, the purpose of which is to provide trained military units to supplement the armed forces "in time of war or national emergency and at such other times as the national security requires." 10 U.S.C. 262.

The reserve components of the Army are the Army National Guard of the United States, 10 U.S.C. 261(a)(1), and the Army Reserve, 10 U.S.C. 261(a)(2). The reserve components of the Air Force are the Air National Guard of the United States, 10

U.S.C. 261(a)(5), and the Air Force Reserve, 10 U.S.C. 261(a)(6).² The Army and Air National Guard of the United States (collectively "NGUS") are in the "Ready Reserve," 10 U.S.C. 269(b)—the units whose availability for active duty are most relied upon. 10 U.S.C. 268(a), 672, 673.

The Army NGUS is defined by statute as "the reserve component[s] of the Army all of whose members are members of the Army National Guard." 10 U.S.C. 101(11); 32 U.S.C. 101(5). See also 10 U.S.C. 101(13); 32 U.S.C. 101(7) (same definition for Air NGUS). To become a member of the NGUS, a person must enlist in, and be federally recognized as a member of, the National Guard of a particular state. 10 U.S.C. 591(a), 3261, 8261.³ Under this "dual enlistment" system established in 1933 (which we shall presently describe in fuller detail), Guardsmen, when not on active duty in the NGUS, are administered as members of their respective state National Guard units. 10 U.S.C. 3079, 8079. When on active duty as NGUS members, however, Guardsmen are relieved of duty in their state National Guard units. 32 U.S.C. 325.

As a reserve component of the armed forces, the NGUS is ordinarily not on active duty. However, the NGUS may be ordered to active duty by federal authorities in a variety of circumstances. Congress, for example, may order the NGUS to active duty and "retain[] [it] as long as so needed" whenever Congress determines that "more units * * * are needed for the national security than are in the regular components of the ground and air forces." 10 U.S.C. 263. There is no restriction as to the purpose for which such units may be used.

² The status of the Naval Reserve, see 10 U.S.C. 261(a)(3), which is not a part of the NGUS/National Guard system, is not at issue in this case.

³ An individual enlisting in the National Guard also enlists in the NGUS, see 32 U.S.C. 301. However, because no statute requires that all members of the National Guard be members of the NGUS as well, there may be rare instances in which an individual's membership in the NGUS is terminated, while his membership in the state National Guard is not. See *Zitser v. Walsh*, 352 F. Supp. 438, 440 (D. Conn. 1972).

Executive Branch officials may also order reserve forces to active duty under a number of circumstances. 10 U.S.C. 672-675. In times of war or national emergency, the appropriate official may order any member of a reserve component into active duty for any purpose other than training. 10 U.S.C. 672(a). When the President determines "that it is necessary to augment the active forces for any operational mission," the appropriate Executive Branch officials may order up to 200,000 members of the reserve to active duty for a period of not more than 90 days, subject to certain restrictions as to use and certain reporting requirements. 10 U.S.C. 673b. In the event of "national emergency declared by the President" or in some other circumstances, the appropriate official may order up to 1,000,000 reservists to active duty, again subject to certain restrictions as to use and certain reporting requirements. 10 U.S.C. 673.

b. At issue in this case are two further provisions for ordering reservists to active duty. Pursuant to 10 U.S.C. 672(b), the appropriate official may order any reservist to active duty for up to fifteen days for any purpose. Pursuant to 10 U.S.C. 672(d), the appropriate official may order any consenting reservist to active duty indefinitely for any purpose. These two provisions are the only provisions for activating reserve forces that distinguish in any way between the NGUS and other reserve components. They provide that an NGUS unit or member, unlike members or units of other reserve components, may not be ordered into active duty "without the consent of the governor of the State" in which the unit or member is located. Pursuant to the provision at issue in this case—the Montgomery Amendment, 10 U.S.C. 672(f)—such consent "may not be withheld (in whole or in part) with regard to active duty outside the United States * * * because of any objection to the location, purpose, type, or schedule of such active duty."

c. The NGUS receives all of its funding from Congress, and forms an integral part of the total armed forces of the United States. See Pet. App. A116. In 1986, the Army NGUS provided 46% of the Army's combat units and 28% of its support forces. In the event of full mobilization, 18 of the 28 Army divisions would be provided wholly or in part by the Army NGUS. For its

part, the Air NGUS operates and maintains more than 1,700 aircraft. In fiscal year 1987, it provided, *inter alia*, 73% of the Nation's air defense interceptor forces, 52% of tactical air reconnaissance, 34% of tactical airlift, 25% of tactical fighters, 17% of aerial refueling, and 24% of tactical air support forces. J.A. 12-13. NGUS personnel participated in the Grenada mission and the air strike on Libya. Pet. App. A120-A121 n.41. They also played a vital role in the recent operation in Panama.

3. As currently defined, the militia of the United States includes all able-bodied males between the ages of 17 and 45, with some exceptions, see 10 U.S.C. 312, who are, or have declared the intention of becoming, citizens of the United States, as well as all female citizens who are commissioned officers of the National Guard. 10 U.S.C. 311(a). The President may call the militia of any State into federal service when civil unrest in that State is such that it has become "impracticable to enforce the laws of the United States * * * by the ordinary course of judicial proceedings," 10 U.S.C. 332, or when there is an insurrection in another State against its government, 10 U.S.C. 331. See note 17, *infra*.

The militia is divided into two classes: the organized militia, which consists of the National Guard and the Naval Militia, and the unorganized militia, which includes all other members of the militia. 10 U.S.C. 311(b). The Army and Air National Guard (collectively the "National Guard") are defined separately from the Army and Air NGUS (reserve components of the Army and Air Force). The Army and Air National Guard are "that part of the organized militia of the several States * * * that:

- (A) is a land [air] force;
- (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;
- (C) is organized, armed and equipped wholly or partly at Federal expense; and
- (D) is federally recognized."

10 U.S.C. 101(10) and (13); 32 U.S.C. 101(4) and (6). Although States are not required to maintain National Guard units, every State, in addition to the District of Columbia, Puerto Rico, and certain territories, has a National Guard.

Aside from the statutes cited above permitting the President to call "the militia" into federal service, Congress has enacted legislation specifically exercising the federal government's authority over the state National Guard. The President may call the National Guard into federal service for the three purposes listed in the Militia Clauses: to repel a foreign invasion, suppress a rebellion against the authority of the United States, or to enforce the laws of the United States. 10 U.S.C. 3500, 8500.⁴ When the National Guard is called into federal service, the orders "shall be issued through the governors of the States." 10 U.S.C. 3500.

Congress has also exercised its constitutionally granted authority to organize, arm, and discipline the National Guard. In general, the organization and composition of the National Guard is required to be the same as that prescribed for the Army and Air Force. 32 U.S.C. 104(b). Congress has also set forth eligibility criteria for membership in the National Guard, see 32 U.S.C. 313, and has required those who qualify for service to take an oath to support and defend the Constitutions of the United States and their own State and to obey orders of the President and their respective governors. 32 U.S.C. 304, 312. In addition, Congress requires each National Guard unit to assemble for drill instruction at least 48 times per year and to participate in annual, 15-day training camps. 32 U.S.C. 502.

Congress also provides the bulk of the funding for the National Guard. 32 U.S.C. 107. The Department of Defense currently pays more than 90% of the National Guard's expenses. J.A. 13. The President, however, may deny federal funding to any State whose National Guard does not comply with federal rules and regulations. 32 U.S.C. 108.

4. In addition to its National Guard, a State may organize and maintain a separate state defense force. 32 U.S.C. 109(c). A state defense force may be used as the State's chief executive sees fit, but may not, by statute, be called or drafted into the

⁴ The authority to call the National Guard into federal service pursuant to 10 U.S.C. 3500, 8500, overlaps substantially with the authority to call the militia into federal service pursuant to 10 U.S.C. 331-333.

armed forces of the United States. 32 U.S.C. 109(c). Currently at least 30 States have enacted statutes providing for the organization of such defense forces.⁵ We are informed that at least 10,000 individuals are currently enrolled in such organizations.⁶

5. This case concerns NGUS units ordered to active duty under 10 U.S.C. 672(b) and (d). Both of those provisions generally require the consent of the governor of the State in which the NGUS units are located. See App. *infra*, 1a-2a. In 1985 and 1986, several governors, including Governor Perpich, expressed opposition to the Administration's Central American policy and either withheld their consent to NGUS training missions in that region or indicated that they would do so. J.A. 24-26. In response, Congress in 1986 enacted the Montgomery

⁵ Twenty-four States have statutes providing for a state defense force or a state guard that is separate from the National Guard: Alabama, Ala. Code § 31-2-8 (1975); Alaska, Alaska Stat. § 26.05.100 (1962); California, Cal. Mil. & Vet. Code § 120 (West 1988); Georgia, Ga. Code Ann. § 38-2-3(a)(3) (1982 & Supp. 1989); Indiana, Ind. Code § 10-2-8-1 (1988); Louisiana, La. Rev. Stat. Ann. § 29:5 (West 1989); Maryland, Md. State Guard Code Ann. art. 65, § 62 (1983); Massachusetts, Mass. Ann. Laws ch. 33, § 10 (Law. Co-op. 1983); Michigan, Mich. Comp. Laws Ann. § 32.651 (West 1985 & Supp. 1989); Mississippi, Miss. Code Ann. § 33-5-51 (1972 & Supp. 1989); Montana, Mont. Code Ann. § 10-2-701 (1988); Nebraska, Neb. Rev. Stat. § 55-201 (1988); New Mexico, N.M. Stat. Ann. § 20-5-1 (1989); New York, N.Y. Military Law § 165 (McKinney 1953 & Supp. 1990); Ohio, Ohio Rev. Code Ann. § 5920.01 (Anderson 1977 & Supp. 1988); Oregon, 1989 Or. Laws 361 (amending Or. Rev. Stat. Ann. § 396.105 (1987)); Rhode Island, R.I. Gen. Laws § 30-5-5 (1982); South Carolina, S.C. Code Ann. § 25-3-10 (Law. Co-op. 1977); Tennessee, Tenn. Code Ann. § 58-1-402 (1980); Texas, Tex. Gov't Code Ann. § 231.051 (Vernon 1988); Utah, Utah Code Ann. § 39-4-1 (1988); Vermont, Vt. Stat. Ann. tit. 20, § 1151 (1987); Virginia, Va. Code Ann. § 44-1 (1986 & Supp. 1989); Washington, Wash. Rev. Code § 38.16.040 (1964). Governors from at least six other states have the statutory authority to create a state defense force: Colorado, Colo. Rev. Stat. § 28-4-104 (1989); Delaware, Del. Code Ann. tit. 20 § 301 (1985); Hawaii, Haw. Rev. Stat. § 122A-2 (1988); Kentucky, Ky. Rev. Stat. Ann. § 37.170 (Michie 1985); New Jersey, N.J. Rev. Stat. Ann. § 38A:9-1 (1968); Wyoming, Wyo. Stat. § 19-3-101 (1977). Minnesota law appears to recognize a "state guard," in addition to the National Guard. See Minn. Stat. Ann. §§ 190.06, 191.09 (West 1962 & Supp. 1990).

⁶ Cf. Preparedness Training in Va., Wash. Post, Aug. 9, 1987, at B1, B10.

Amendment. 10 U.S.C. 672(f); see 132 Cong. Rec. 21,660-21,663 (1986).⁷ That Amendment provides:

The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

The Montgomery Amendment did not, however, eliminate the consent provisions altogether. A governor may still withhold his consent based upon other grounds, for example, that the state National Guard is needed to deal with a local emergency. See H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 475 (1986); 132 Cong. Rec. 21,633 (1986) (remarks of Rep. Montgomery).

Petitioners, the State of Minnesota and its governor, Rudy Perpich, commenced this action after the Secretary of Defense ordered members of an NGUS unit from Minnesota to active duty pursuant to 10 U.S.C. 672(b) or (d) for three missions in Central America. J.A. 6. Governor Perpich asserted that he would have objected to one of those orders had it not been for the limitations imposed by the Montgomery Amendment on his power to veto the federal government's decision to order an NGUS unit from his State into active duty. *Ibid.* Such limitations were unconstitutional, Governor Perpich claimed, because they violated Art. I, § 8, Cl. 16 of the Constitution, which "reserv[es] to the States . . . the Authority of training the Militia according to the discipline prescribed by Congress." Petitioners sought a declaratory judgment that the Montgomery Amendment was void and injunctive relief barring the United States from ordering any NGUS unit from Minnesota to active duty for training abroad without Governor Perpich's consent. J.A. 7.

⁷ Congress enacted the Montgomery Amendment three times with identical language. It was first enacted on October 18, 1986, as part of the fiscal 1987 continuing appropriations resolution. H.R.J. Res. 738, Pub. L. No. 99-500, § 9122, 100 Stat. 1783-127. It was then included in the corrected version of that resolution enacted on October 30, 1986. Pub. L. No. 99-591, § 9122, 100 Stat. 3341-127. Finally, it was enacted on November 14, 1986, as part of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-961, § 522, 100 Stat. 3871.

6. The district court granted summary judgment for the United States. Pet. App. A141-A153. In sustaining the constitutionality of the Montgomery Amendment, the court first noted that "[a]ll authority to provide for the national defense resides in Congress, and state governors have never had, and never could have jurisdiction in this area." Pet. App. A149. Accordingly, the court found that "the dual enlistment system, under which National Guard members serve as members of both a state national guard and of the National Guard of the United States, is a valid exercise of Congressional power under the Army and Necessary and Proper clauses." Pet. App. A149-A150.

Relying on the *Selective Draft Law Cases*, 245 U.S. 366 (1918), the district court reasoned that "[b]ecause Congress' authority to provide for the National defense is plenary, the Militia clause * * * cannot constrain Congress' authority to train the Guard as it sees fit when the Guard is called to active federal service." Pet. App. A150. The court found that the gubernatorial consent provisions in 10 U.S.C. 672(b) and (d), which the Montgomery Amendment restricted, were "not constitutionally required," but were rather "an accommodation to the states" that "Congress may withdraw * * * without violating the Constitution." Pet. App. A150.

7. A divided panel of the court of appeals reversed. Pet. App. A63-A141. The panel majority (Judge Heaney and Senior Judge Fairchild, sitting by designation) held that the Montgomery Amendment "contravenes the intent of the Framers" and "violates the plain language of the Constitution." Pet. App. A66. The panel also ruled that the Montgomery Amendment is at odds with this Court's decisions in the *Selective Draft Law Cases*, *supra*, and *Cox v. Wood*, 247 U.S. 3 (1918). The panel interpreted those decisions to establish that "the army power could supersede reserved state authority over the militia only when Congress had determined that there was some sort of exigency or extraordinary need to exert federal power." Pet. App. A92. Judge Magill dissented. Pet. App. A123-A141.

8. Sitting en banc, the court of appeals granted rehearing, vacated the panel's decision, and affirmed the district court.

Pet. App. A1-A62.1. The en banc court described the basic issue as, "when the State claims a right to control Militia training, and Congress claims 'We're training the Army, not the Militia,' who wins?" Pet. App. A9. It resolved that question in favor of the federal government, noting that "[t]he authority given to Congress by the army clause is plenary and exclusive." *Ibid.* Like the district court, the court of appeals determined that the dual enlistment system and the authority conferred on federal officials to order NGUS units to active duty for training were valid exercises of Congress's power under the Army Clause. Pet. App. A9-A10. The Court held that the *Selective Draft Law Cases*, *supra*, and *Cox v. Wood*, *supra*, "made clear that the army clause is not limited by the militia clause." Pet. App. A11. The majority concluded:

Congress' army power is plenary and exclusive. The reservation to the States of authority to train the Militia does not conflict with Congress' authority to raise armies for the common defense and to control the training of federal reserve forces. The Montgomery Amendment is a constitutional exercise of Congress' army powers.

Pet. App. A13.

Judges Heaney and McMillian dissented. They adhered to the views expressed in the panel opinion. Pet. App. A14-A62.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges the constitutionality of the dual enlistment concept, the basis upon which major portions of the armed forces reserves of this Nation have been organized for more than fifty years. Acting in express reliance upon this Court's holdings in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox v. Wood*, 247 U.S. 3 (1918), Congress created two organizations—the National Guard of the United States (NGUS) and the state National Guard—that make use of the same individual members for complementary federal and state purposes. The question in this case is whether a cooperative arrangement of this nature, largely funded by the federal government, is constitutional.

The federal government relies on the federal element of the system—the NGUS—as an essential reserve component of this Nation's armed forces. Under the "Total Force" doctrine, which has governed national strategic defense planning since the early 1970's, the regular (or active duty) armed forces are intentionally maintained at smaller levels than would be necessary to assure our security. For virtually any important military mission, the national security depends upon the immediate availability of trained NGUS troops to supplement the regular forces.

For their part, State governments make use of the members of the NGUS in their status as members of the state National Guard where, by statute, they function as a component of the militia. In this status, the Guardsmen are available to their respective state governments to assist in a wide variety of situations, including civil disorder and natural disasters. In their status as members of the state National Guard, Guardsmen may be called into federal service only for the three purposes enumerated in the Militia Clauses—executing the laws of the union, repelling invasions, and suppressing insurrections. States need not maintain National Guard units. Given the substantial financial incentive provided by federal funding of the NGUS/National Guard system, however, all States have chosen to maintain National Guard units and thus to participate in the dual enlistment system.

Petitioners instituted this case seeking an injunction against use of the federal component of the dual enlistment system, the NGUS, for a purpose—training—that is alleged to exceed the federal government's authority under the Militia Clauses. Essentially, their claim is that, despite Congress's intent to create the NGUS as a federal military force outside the limitations of the Militia Clauses, Congress succeeded only in creating a militia organization under the primary control of the States.

This Court squarely rejected petitioners' theory seventy years ago in the *Selective Draft Law Cases* and *Cox v. Wood*. In those cases, the Court established unequivocally that Congress enjoys broad authority to raise a national army and that this power is

not limited in any way by the Militia Clauses. Even if creation of the NGUS could be seen to "narrow[] the area over which the militia clause operate[s]," *Selective Draft Law Cases*, 245 U.S. 366, 384 (1918), these cases squarely hold that Congress may achieve this result through exercise of its Army Clause powers.

If accepted at this late date, petitioners' theory would have severe consequences for the ability of our armed forces to meet the Nation's defense needs. Each of 50 state governors would have veto power over use of NGUS troops from his or her State outside the three purposes set forth in the Militia Clauses. Moreover, training of the NGUS, whether for these three purposes or for any other purpose, would be under exclusive control of the States.

Petitioners advance no persuasive reason to support their contention that the Constitution requires that the NGUS be treated as a "Militia" organization, rather than as a component of the national armed forces. Although it is true that all members of the NGUS are members of the corresponding state National Guard unit, this defining trait of the dual enlistment system provides substantial benefit to the States by providing them with an organized militia largely at federal expense. Inasmuch as no State is required to maintain a state National Guard, the system does not in any respect require the States to cede reserved powers to the federal government.

Nor does the system render the Militia Clauses devoid of application. The Militia Clauses remain fully applicable to the state National Guard. Under the current statutory scheme, the States are assured of the use of their National Guard units for any legitimate state purpose. They are simply forbidden to use their control over the state National Guard to thwart federal use of the NGUS for national security and foreign policy objectives with which they disagree.

The history of the framing and ratification of the Army and Militia Clauses confirms that Congress may use its broad Army Clause powers to organize and maintain the NGUS as a component of the national armed forces, outside the limitations of the Militia Clauses. While the Militia Clauses divide powers be-

tween the state and federal governments in a careful compromise between those who supported and those who opposed federal power over the militia, the federalists succeeded in securing for Congress virtually unrestricted powers to raise and employ the armed forces. There is no reason to believe that the Framers intended that state power over the militia was to be the sole exception to their decision to vest exclusive power in the federal government with respect to foreign affairs and the national security.

Recognizing that their argument entails the unacceptable conclusion that the NGUS may be used only to execute federal law, repel invasions, and suppress insurrections as provided by the Militia Clauses, petitioners advance a novel constitutional theory that the federal government may ignore the limitations on federal power in the Militia Clauses in the event of a "national exigency" declared by Congress or the President. This theory finds no support in the text or history of the relevant constitutional provisions. In essence, it amounts to a suggestion that, because the *Selective Draft Law Cases* arose during the "national exigency" of World War I, the holding and reasoning of those cases should be confined to situations in which such an "exigency" has been declared. This misguided suggestion is particularly inappropriate in light of Congress's express reliance on this Court's decisions in creating and employing the National Guard of the United States as an essential link in this country's armed forces.

ARGUMENT

THE MONTGOMERY AMENDMENT, WHICH LIMITS THE GROUNDS UPON WHICH A STATE GOVERNOR CAN OBJECT TO ACTIVE DUTY OVERSEAS OF UNITS OF THE NATIONAL GUARD OF THE UNITED STATES FROM HIS STATE, IS A PERMISSIBLE EXERCISE BY CONGRESS OF ITS PLENARY POWER UNDER THE ARMY CLAUSE AND DOES NOT VIOLATE THE MILITIA CLAUSES

A. *The Constitution Does Not Forbid The Federal Government And The States From Entering Into A Cooperative Arrangement Such As The Dual Enlistment System*

The issue in this case is whether the Constitution permits the federal government and the States to enter into a cooperative arrangement whereby the same individuals are enlisted as both NGUS troops—reserve members of the United States Army and Air Force constitutionally indistinguishable from any other members of the national armed forces—and state National Guard members—members of the "militia" in constitutional terms—over whom federal authority is constitutionally limited. We submit that the "dual enlistment" system, as currently embodied in federal statutes governing the NGUS and the National Guard, is scrupulously faithful to all relevant constitutional provisions. The system was adopted by Congress in express reliance on this Court's decisions in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox v. Wood*, 247 U.S. 3 (1918), holding that the Militia Clauses do not act as a limitation on Congress's plenary authority under the Army Clause. The dual enlistment system permits—but does not require—the States to utilize federally funded reserve troops as state militia, thus avoiding the costly burden of funding and maintaining entirely separate state militias. Far from oppressing the States or depriving them of a prerogative granted by the Constitution, the system is in the highest tradition of cooperative federalism and should be upheld.

1. Two types of military forces, both expressly recognized by the Constitution, are at issue. In Article I, Section 8, Clause 12, Congress is granted authority "[t]o raise and support

Armies." Petitioners do not dispute that, pursuant to authority granted by the Army Clause, Congress may provide for armies composed of any combination of volunteers and draftees, regular soldiers and reservists. See *Selective Draft Law Cases, supra*; *Cox v. Wood, supra*. Nor do petitioners dispute that armed forces raised pursuant to the Army Clause may constitutionally be employed by the federal government for virtually any purpose seen by Congress and the President to be in the national interest.

In contrast to the plenary power granted by the Army Clause, the Constitution defines carefully circumscribed zones of federal and state authority over the Militia, the other type of military force identified in the Constitution. Congress may call forth the militia only to "execute the Laws of the Union, suppress Insurrections and repel Invasions." Art. I, § 8, Cl. 15. Moreover, although Congress may "provide for organizing, arming, and disciplining" the militia, for "governing" them while in federal service, and for prescribing "discipline" for them while in training, Art. I, § 8, Cl. 16, the Constitution reserves to the States "the Appointment of the Officers, and the Authority of training" the militia. *Ibid.*

2. The statutes governing the NGUS demonstrate that it is a force over which the federal government exercises the plenary control that is a characteristic of bodies raised as "Armies" under the Army Clause.⁹ The statutory scheme that has evolved constitutes the NGUS as a "reserve component" of the Army and Air Force, 10 U.S.C. 101(11), 101(13); 32 U.S.C. 101(5), 101(7), and thus the NGUS is part of the "armed forces" of the United States, 10 U.S.C. 101(4); 32 U.S.C. 101(2). With a single exception—the gubernatorial veto power of 10 U.S.C. 672(b) and (d), which is at issue in this case—the circumstances under

⁹ Congress expressly stated its intent to create the NGUS as an Army Clause organization when it passed the legislation first establishing the dual enlistment system in 1933. See pp. 38-39, *infra*.

which the NGUS may be ordered to active duty, see 10 U.S.C. 672-675, are in no way different from those in which other reserve components of the armed forces, see 10 U.S.C. 261 *et seq.*, may be so ordered. Most significantly, the uses to which the NGUS may be put once in active duty are identical to the uses to which other reserve components may be put or, indeed, to the uses to which the armed forces may generally be put in protecting national security. In all these respects, the statutory scheme embodies Congress's determination that the NGUS must be generally available on the same basis as other components of the armed forces, pursuant to the Army Clause of the Constitution.

The federal statutes governing state National Guard units differ dramatically from the legal framework governing the NGUS. In each case, the difference demonstrates that the state National Guard is a Militia Clause, not an Army Clause, organization.⁹ The state National Guard is defined as "that part of the organized militia" which, *inter alia*, has officers appointed pursuant to the Militia Clauses of the Constitution. 10 U.S.C. 101(10), 101(12); 32 U.S.C. 101(4), 101(6). The state National Guard may be called into federal service for the three purposes set forth in the Militia Clauses—executing federal law, suppressing insurrections, and repelling invasions. See, e.g., 10 U.S.C. 331-333, 3500, 8500. In addition, much of Title 32 of the U.S. Code is concerned with the organization, arming, and discipline of the state National Guard—functions expressly vested in the federal government by the Militia Clauses.

3. Petitioners have no quarrel with the statutory scheme governing the state National Guard. As is evident from their Complaint, their sole contention is that the NGUS may not be "trained" by the federal government without their consent. See

⁹ Just as Congress expressly stated its intent to create the NGUS as an Army Clause organization, it similarly was quite clear in stating its intent to organize the National Guard pursuant to its Militia Clause powers. See pp. 38-39, *infra*.

J.A. 7, ¶ 1. But if the NGUS is constitutionally an "Army," as it manifestly is, then petitioners have no more constitutional right to control its training overseas—or its use for any other purpose—than they would to control similar use of any other regular or reserve unit of the United States armed forces. In short, petitioners' argument hinges entirely on their contention that, although Congress created and funded the NGUS with the objective of creating a reserve "Army," Congress in fact succeeded only in creating a "Militia" organization subject to limited federal control as specified in the Militia Clauses.

This Court squarely repudiated the premise underlying petitioners' argument in the *Selective Draft Law Cases*, *supra*, and *Cox v. Wood*, *supra*. In the *Selective Draft Law Cases*, the Court rejected numerous challenges to the draft law of 1917, including the claim that persons could not be drafted into the Army except for the three purposes specified in the Militia Clauses. 245 U.S. at 381-382.¹⁰ Four months later, in *Cox v. Wood*, 247 U.S. 3 (1918), it was argued that, "although Congress had the power to call the citizens of the United States, the

¹⁰ The draft law at issue in the *Selective Draft Law Cases* and *Cox v. Wood* was enacted on May 18, 1917 (ch. 15, 40 Stat. 76), one month after Congress declared war in World War I. Act of Apr. 6, 1917, ch. 1, 40 Stat. 1, S. J. Res. 1, 65th Cong. 1st Sess.). Section 1 (Second) of the draft law (40 Stat. 76) expressly authorized the President "[t]o draft into the military service of the United States . . . any or all members of the National Guard" to "serve therein for the period of the existing emergency unless sooner discharged." Section 1 (Third and Fourth) also authorized the drafting of 1,000,000 men other than National Guardsmen. 40 Stat. 76-77. All draftees were to serve "for the period of the war, unless sooner terminated by discharge or otherwise." Act of June 15, 1917, ch. 29, § 4, 40 Stat. 217.

The 1917 draft depended upon the mechanism for drafting National Guard members created by statute the previous year. The National Defense Act, ch. 134, 39 Stat. 166, had provided for drafting into federal service of individual members of the National Guard at any future time "[w]hen Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army . . . to serve therein for the period of the war unless sooner discharged." § 111, 39 Stat. 211.

national militia, to compulsory service in virtue of the militia clause of the Constitution (Article I, § 8)," that power was limited to use for the three purposes specified in the Militia Clauses. 247 U.S. at 4. Holding that this argument rested upon a "fundamental mistake" (*id.* at 5), the Court reaffirmed its holding in the *Selective Draft Law Cases*.¹¹

The Court's decisions in the *Selective Draft Law Cases* and *Cox v. Wood* established unequivocally that Congress has plenary authority to raise a national army, not limited by provisions of the Militia Clauses. In the *Selective Draft Law Cases*, the Court noted that, under the Articles of Confederation, the power to raise armies was divided between Congress and the States; Congress had the right to call on the States to provide forces and the States had the duty to comply. 245 U.S. at 382. The Constitution, however, united the two parts of this power and vested it in Congress. When this occurred, "all governmental power on the subject was conferred." *Ibid.* The result was that "[t]he army sphere therefore embraces such complete authority." This holding was reaffirmed in *Cox v. Wood*, 247 U.S. at 6.¹²

¹¹ Petitioners correctly state (Pet. Br. 33-34) that the *Selective Draft Law Cases* did not involve challenges by members of the organized militia or National Guard. See Brief for the United States at 52, 60, *Selective Draft Law Cases*, 245 U.S. 366 (1918). Nor did *Cox v. Wood*. The point is irrelevant, however, because those cases did involve members of the *unorganized* militia, and the Militia Clauses make no distinction between the two classes of the militia. The power to draft into the Army members of the organized militia—who then as now consisted of members of the state National Guard—was upheld in *Ex parte Dorstal*, 243 F. 664 (N.D. Ohio 1917).

¹² In numerous other cases, this Court has established that Congress enjoys plenary authority under the Army Clause to provide for the national defense. *E.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1871); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). Moreover the Necessary and Proper Clause (U.S. Const. Art. I, § 8, Cl. 18) grants Congress broad power to select any means to achieve the ends within the scope of the enumerated powers under Article I of the Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Taken

This holding alone is dispositive in this case. The NGUS, like the regular army whose composition was at issue in the *Selective Draft Law Cases*, is defined and treated as a component of the national army; in consequence, Congress has plenary power to train, organize, and utilize it. To be sure, the NGUS is a reserve component composed of volunteers, whereas the force being raised in the *Selective Draft Law Cases* was a regular army composed of conscripts. Those differences, however, do not alter the result. If anything, because conscription of members of the militia into a standing army is a far greater intrusion on state autonomy than a provision for voluntary enlistment into a reserve force, the result in this case follows *a fortiori*.

Moreover, the Court's opinion in the *Selective Draft Law Cases* addressed the specific argument advanced by petitioners here—that the Militia Clauses must prevail when their specific limitations upon federal power clash with Congress's exercise of its broad powers under the Army Clause. See Pet. Br. 11-13.¹³ Indeed, the Court repeatedly explained that, although the Militia Clauses left control over the militia in the hands of the States in the absence of congressional action to the contrary, this “did not diminish the military power,” but simply left “an area of authority” to the States “unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared.” 245 U.S. at 383.¹⁴ In *Cox v.*

together, these two Clauses compel the conclusion that Congress's authority to provide for the national defense is plenary and unlimited by the Militia Clauses.

¹³ Indeed, the lead plaintiff in the *Selective Draft Law Cases*, like petitioners here, expressly relied upon the power reserved to the States to train the militia. He argued that, under the draft law, the plaintiffs “would be taken from the unorganized militia and forced to serve in the regular army in violation of the provisions . . . reserv[ing] to the States the authority of training the militia and the appointment of officers.” Brief of Plaintiff in Error at 16, *Arver v. United States (Selective Draft Law Cases)*, 245 U.S. 366 (1918).

¹⁴ See also 245 U.S. at 382 (States retain control over the militia “to the extent that such control was not taken away by the exercise by Congress of its power to raise armies.”); *id.* at 384 (referring to fact that “power granted to Congress to raise armies . . . was susceptible of narrowing the area over which the militia clause operated”). The Court also observed that the fact that Congress had provided for calling the militia into federal service under the

Wood, the Court added the coda to this exposition: the powers of Congress to raise an army “were not qualified or restricted by the provisions of the militia clause.” 247 U.S. at 6.

The Court's reasoning is directly applicable in this case. As explained above, petitioner's argument is that the NGUS, understood by Congress to be an Army Clause organization, must be classified for purposes of constitutional analysis as a “Militia” organization. That contention flies in the face of Congressional intent. Congress expressly created the NGUS as “a reserve component of the Army,” 10 U.S.C. 101(13); 32 U.S.C. 101(5). What is more, the Article I branch carefully structured the Nation's armed forces upon the understanding that the NGUS would be available for any military purpose. Petitioners nonetheless assert that the specific commands of the Militia Clauses dictate that Congress cannot so structure the armed forces. The Court's reasoning in the *Selective Draft Law Cases*—founded in the text of the Constitution—provides the answer to this assertion.

4. If accepted, petitioner's argument would have serious consequences for the Nation's defense policy. The Nation relies on the NGUS for 46% of its combat units and 28% of its support forces. The Air Force is even more dependent on the NGUS, relying on NGUS units for 73% of its air defense interceptor forces, 52% of its tactical air reconnaissance capability, 34% of its tactical air lift capacity, and a substantial portion of its other duties. See J.A. 12-13.

If, as petitioner would have it, NGUS units were fully subject to the Militia Clauses, these forces could be trained only as authorized by each of the fifty state governors—each with his or her own vision of sound foreign and defense policy. Equally important, NGUS units could be put into service only for the three purposes enumerated in the Militia Clauses—executing federal law, repelling invasion, and suppressing insurrections. Although the scope of these three phrases has never been judicially construed, an attempt to employ the NGUS in a way

Militia Clauses without exerting its Army Clause power does not lead to the conclusion “that the latter power when exerted was not complete to the extent of its exertion and dominant.” *Id.* at 383.

arguably not included within these purposes—for example, the recent operation in Panama, the 1986 raid on Libya, the 1983 operation in Grenada, or even the Vietnam conflict, the Korean conflict, or World War II¹⁵—could lead to litigation at a time when the Nation could least afford it.¹⁶ Even if litigation could be avoided, see *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), the constitutional bar—even if not judicially enforceable—would remain.¹⁷

¹⁵ NGUS troops were used in each of these operations. See Pet. App. A59-A60 (Libya and Grenada); J. Mahon, *History of the Militia and the National Guard* 184-197 (World War II), 208-210 (Korea), 242-243 (Vietnam) (1983).

¹⁶ Indeed, there is precedent in our history for a refusal by militiamen to undertake a mission outside the United States, on the ground that it did not fall within the three purposes specified in Clause 15. In the War of 1812, New York militia units refused to cross into Canada to fight British soldiers there on the ground that to do so could not be "to repel an invasion." See *Selective Draft Law Cases*, 245 U.S. 366, 384-385 (1918); Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 189 (1940). It was feared for similar reasons that the militia could not be used in the Mexican-American War and the Spanish-American War. See *id.* at 190, 192. See also 29 Op. Att'y Gen. 322 (1912) (discussing extent to which militia might be available for use on foreign soil). The very purpose of creating the NGUS was to make available a reserve force that, as a component of the federal armed forces, would not be subject to these constraints. See pp. 38-39, *infra*.

¹⁷ Petitioners' argument would have implications beyond the international arena. In September 1957, Governor Faubus of Arkansas called state National Guardsmen to active duty to oppose orders of a federal district court requiring the desegregation of Central High School in Little Rock. By virtue of the serious threat to national order, President Eisenhower in turn ordered "into the active military service of the United States . . . units of the National Guard of the United States and of the Air National Guard of the United States within the State of Arkansas" to enforce the federal court order. Exec. Order No. 10,730, 3 C.F.R. 389, 390 (1954-1958 Comp.). The NGUS units remained on duty for the balance of the school year. See generally *Cooper v. Aaron*, 358 U.S. 1, 9-12 (1958).

President Eisenhower's order was specifically addressed to the NGUS, not to the state National Guard units. The order cited 10 U.S.C. 332-334, provisions under which either "the militia" or "the armed forces" could be utilized to execute federal law. Had the President "called" the National Guard—the state militia—into federal service, Governor Faubus, who was largely responsible for the defiance of federal law, would have remained in the chain of

5. Ultimately, petitioners' argument represents a challenge to state as well as federal authority. Although every State has chosen to organize a National Guard unit under the dual enlistment system, no federal statute requires the States to do so. See 32 U.S.C. 109(c) (referring to state National Guard "if any"). Yet each State has independently concluded that the advantages of this cooperative dual system—in terms of federal funding and training—far outweigh the slightly reduced availability of its organized militia entailed by the need to permit the members of its National Guard to perform their federal obligations as members of the NGUS. If the NGUS is constitutionally a "Militia" organization despite Congress's best efforts to organize and constitute it as a reserve "Army," then the decisions of each State to accommodate the federal interest would be rendered wholly ineffective. Regardless of the State's intent, the State's participation in a federal-state partnership structured along the lines of the NGUS/National Guard system would inevitably, according to petitioners, render the NGUS a constitutional "Militia" organization.¹⁸ Because of the constitutional

command and could have used his position to thwart the efforts to vindicate the court's desegregation orders. See 10 U.S.C. 3500, 8500 (orders to call National Guard into federal service "shall be issued through the governors of the States"). Because, however, the NGUS was available as a component of the armed forces, over which Governor Faubus could exercise no control, the President chose instead to order the NGUS into active service to meet the emergency. See J. Mahon, *History of the Militia and the National Guard* 224-226 (1983).

¹⁸ Indeed, neither petitioners, amici States, nor the dissenting opinion in the court of appeals make clear the precise limits to Congressional power under the Militia Clauses. Presumably, all would agree that the national armed forces may constitutionally maintain reserve forces, aside from the NGUS, that are not subject to the Militia Clauses. See 10 U.S.C. 261. Yet, it is difficult to see why, if Congress may maintain a reserve force at all, Congress cannot (1) give state governors a voice in selection of officers for such reserve forces, (2) permit state governors to employ such reserve forces for legitimate state functions, and (3) permit state governors to have a limited veto power over the federal use of such reserve forces if they are needed for legitimate state purposes. Since the NGUS is simply a reserve force with all of these

limitations on the use of such an organization, the future of what has been a generally successful form of cooperative federalism would be called into doubt.

B. None Of The Reasons Advanced For Creating A Rule That The NGUS Is A Militia For Constitutional Purposes Are Persuasive

In light of the decisions in the *Selective Draft Law Cases* and *Cox v. Wood*, it is not surprising that petitioners' specific contention—that the NGUS must be governed by the Militia Clauses, rather than the Army Clause—has been rejected by every court to which it has been presented, including the district court and the en banc court of appeals in this case. See *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969); *Dukakis v. United States Dep't of Defense*, 686 F. Supp. 30 (D. Mass.), aff'd, 859 F.2d 1066 (1st Cir. 1988), cert. denied, 109 S. Ct. 1743 (1989); *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968).¹⁹ Although petitioners and their supporting amici advance a number of reasons why, in their view, the unanimous judgment of these courts is mistaken, none of those arguments are persuasive.

features, petitioners must identify which features convert what otherwise would be a reserve branch of the national armed forces into a militia governed by the Militia Clause. They have failed to do so.

¹⁹ Petitioners (Pet. Br. 8 n.1, 23) cite this Court's statement in *Maryland v. United States*, 381 U.S. 41, vacated and modified on other grounds, 382 U.S. 159 (1965), that "[t]he National Guard is the modern Militia reserved to the States" by the Militia Clauses, 381 U.S. at 46 (emphasis added). Because *Maryland* involved state National Guard units—not NGUS units—the Court's statement is correct but of no relevance to the constitutional status of the NGUS, the sole issue in this case. In any event, the only issue in *Maryland* was whether, at a time when a state National Guard unit had not been called into federal service, a Guard officer who also served as a caretaker of the unit's federally provided equipment was an "employee" of the federal government for purposes of the Federal Tort Claims Act. The Court held that he was not. The case did not turn on any issue of constitutional interpretation, and the Court did not purport to decide any such question.

Petitioners also cite several military court decisions that suggest that the gubernatorial consent requirements of 10 U.S.C. 672 have constitutional underpinnings in the Militia Clause. *United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1982); *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978). See Pet. Br. 29 n.20. The constitutional source of authority for the NGUS was not at issue in any of

1. Petitioners argue that the Constitution requires the NGUS to be treated as a "Militia" organization because the NGUS "does not exist apart from the state National Guards" and does not have "separate membership" from the state Guard. Pet. Br. 37 n.26. Both of these statements, although accurate in the main, are irrelevant. Although the NGUS and National Guard have common membership, the fact that both units share the same members is nothing more than a defining feature of the dual enlistment system. It is not a reason for requiring that both organizations be deemed to be "militias" subject to the Militia Clauses.

The NGUS is defined by statute as a "reserve component of the Army [or Air Force] all of whose members are members of the Army [or Air Force] National Guard." 10 U.S.C. 101(11), 101(13); 32 U.S.C. 101(5), 101(7). Under this definition, a State that chose not to maintain a National Guard would thereby preclude formation of an NGUS unit in that State. Similarly, the definition makes clear that all members of the NGUS are also members of the state National Guard.

The principal significance of these provisions is not that the NGUS must be regarded as subject to the Militia Clauses, but simply that Congress has permitted the States to "piggyback" on the federally funded NGUS units at virtually no cost to themselves. Far from being an argument for state control of the NGUS, the common membership of the two organizations distinguishes the current system from a system in which the NGUS and National Guard would have distinct memberships and in which the States would be required to maintain the National Guard units at the States' own expense. The membership overlap between the NGUS and the National Guard represents

those cases, and the statements cited were unaccompanied by even a cursory analysis of the constitutional authority for the NGUS under the Army or Militia Clauses. The issue in each case related to whether accused Guardsmen had properly been on active duty in the NGUS when military authorities attempted to assert court-martial jurisdiction, and the holdings of those cases have been legislatively overruled by 10 U.S.C. 802(d). Because the cases turned on applicable statutes and regulations, the brief statements in the opinions suggesting that the States' consent to the Guardsmen's federal service was constitutionally necessary were at best dicta.

an obvious—indeed central—benefit to the States flowing from the dual enlistment system. But membership overlap provides no basis for refusing to recognize federal control over the NGUS.

2. Amici States appear to argue that the dual enlistment system is tantamount to a system in which “the federal government can force state officers and employees to have federal status, and then use the federal status to avoid express constitutional limits on federal authority.” Br. of Amici States 35. The factual premises of this argument are mistaken.

First, because the NGUS/National Guard system is voluntary, not mandatory, no State is required to cede any officer or employee to the federal government. Members of the state National Guard are members of the federal NGUS not because of any coercion on the part of the federal government, but because the state government has decided that the manifest benefits of the system justify cooperation with federal authorities. Cf. *South Dakota v. Dole*, 483 U.S. 203 (1987).

Second, amici’s description of the dual enlistment system as one in which the federal government co-opts state employees is particularly inapt. All the costs of the NGUS and virtually all costs of the various state National Guards are paid by the federal government. J.A. 13.²⁰ Thus, although the system is based on federal-state cooperation, it could more accurately be characterized as making *federal* employees available at no charge to the States. No constitutional problem is posed by this type of cooperative federalism.

3. Finally, petitioners argue that the court of appeals’ decision “emptied the militia training clause of any significant meaning.” Pet. Br. 10; see also Brief of Amici States at 42. Under the current statutory scheme, however, the States retain their ability to maintain, use, and train their militia organizations—as well as other state defense forces, if they so choose—

²⁰ From 1981 through 1987, Congress provided nearly \$47 billion for manning, equipping, and training the National Guard and the NGUS. J.A. 14. For fiscal year 1990, Congress has authorized over \$8 billion to support these forces. Department of Defense Authorizations Act, 1990, Pub. L. No. 101-165, 103 Stat. 1112.

even if, pursuant to the statutes at issue here, 10 U.S.C. 672(b) and (d), the federal government seeks to employ the same individuals in their NGUS status.²¹

Under the dual enlistment system, the Militia Clauses continue to limit federal control over the state National Guard. The *only* restriction on the State’s ability to make use of the state National Guard is the obvious one—that the state Guard becomes unavailable for state service when the individuals in the state units are activated as NGUS troops. See 32 U.S.C. 325. But this restriction is without constitutional significance. It results not from an improper extension of federal power over the militia, but from the State’s decision to participate in the NGUS/National Guard system.

In any event, federal use of the NGUS has virtually no impact on a State’s ability to use its National Guard. Although the Montgomery Amendment removes the power of a state governor to veto use of NGUS troops from his or her State pursuant to 10 U.S.C. 672 on the basis of the “location, purpose, type, or schedule” of such use, the Amendment does not withdraw the gubernatorial veto power altogether. A governor may still withhold his consent to activation of NGUS troops from his State “if he or she thinks the guardsmen are needed at home for local

²¹ Where, as here, the Constitution provides two alternative sources of federal power, no rule of harmonious construction requires that the limitations of one source be transposed to the other. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which upheld the public accommodations provisions of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, illustrates the point. The *Civil Rights Cases*, 109 U.S. 3 (1883), had held that state action was a necessary element of a violation of the Fourteenth Amendment. In 1964, Congress sought to outlaw racial discrimination in privately owned public accommodations. The Court stated in *Heart of Atlanta* that “Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, Cl. 3 of the Constitution.” 379 U.S. at 249. The Court then upheld the Act under the Commerce Clause without reaching the Fourteenth Amendment question. 379 U.S. at 250. Thus, because Congress had power to reach private discriminatory action under one constitutional provision (the Commerce Clause), the Court did not have to consider whether Congress had exceeded its power under a different provision (the Fourteenth Amendment).

emergencies." 132 Cong. Rec. 21,660 (1986) (statement of Rep. Montgomery); see also H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 475 (1986). The limited—but still important—effect of the Montgomery Amendment is thus to preclude a governor from objecting to the active-duty use of federal forces on the basis of political disagreements with the federal government as to foreign or defense policy. Not surprisingly, amici have come forward with no evidence that the Framers intended to permit a governor, through employment of the State's militia, to interfere in such exclusively federal areas. See, e.g., *United States v. Pink*, 315 U.S. 203, 233 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936).²²

Finally, insofar as the Militia Clauses were intended to assure that States would retain forces for use in maintaining civil order, the current system fully protects that interest. Congress has expressly recognized that "[i]n addition to its National Guard, if any, a State * * * may * * * organize and maintain defense forces." 32 U.S.C. 109(c). These state defense forces may be used "within the jurisdiction concerned, as its chief executive * * * considers necessary." *Ibid.* The state defense force units themselves "may not be called, ordered, or drafted into the armed forces." 32 U.S.C. 109(c). Pursuant to this authorization, at least 30 States have enacted statutes providing for the organization of such defense forces. See note 5, *supra*.

²² Amici also argue that to recognize the NGUS as an "Army" and not a "Militia" would "amount to unlawful Congressional abolition of the militia." Amici States Br. 42. In support of this argument, amici quote *United States v. Miller*, 307 U.S. 174, 178 (1939), in which this Court held that the Second Amendment was intended to "assure continuation and render possible the effectiveness of" the militia. Amici's argument is insubstantial. Although *Miller* indeed held that the intent of the Second Amendment was to preserve the militia from Congressional abolition, the means chosen to accomplish this purpose was to forbid Congress from infringing "the right of the people to keep and bear arms." No action taken by the federal government in this case even remotely detracts from the ability of state National Guardsmen to bear arms as appropriate to their tasks. In fact, by offering the States use of members of the NGUS at federal expense, the federal government has substantially enhanced the States' ability to maintain an effective militia.

The States thus maintain the ability to have forces available for use to maintain order or to perform any other function ordinarily assigned to the state National Guard. Under 10 U.S.C. 672(b) or (d), a governor may continue to refuse to consent to the activation of NGUS members from his State if they are needed in their status as state National Guard members. In cases in which NGUS members are ordered to active duty pursuant to a provision not requiring gubernatorial consent, e.g., 10 U.S.C. 672(a), 673(a), 673b(a), or in cases in which the governor consents to federal activation pursuant to 10 U.S.C. 672(b) or (d), a State may maintain a state defense force to carry out functions that would ordinarily be assigned to the state National Guard. The current statutory scheme thus provides several layers of protection—including the limited gubernatorial veto and the ability to maintain state defense forces—for any State's legitimate interest in having a force available to maintain order.

C. *Nothing In The History Or Structure Of The Army Or Militia Clauses Suggests That Congress Can Exercise Power Over The NGUS Only In Accordance With The Limitations Of The Militia Clause*

1. Petitioners elaborately canvass the history of the framing and ratification of the Militia Clauses to indicate that the Clauses "embody a fundamental structural decision by the Framers concerning a core function of government." Pet. Br. 17. The Militia Clauses indeed reflected a compromise, resolving a dispute between those who favored state control over the militia²³ and those who sought to subject it to federal control to assure national security.²⁴ However, recounting the decision to

²³ Those who favored state control argued that, without a state military force, the States "would pine away to nothing after such a sacrifice of power." 2 M. Farrand, *The Records of the Federal Convention* 331 (Ellsworth) (1911) [hereinafter Farrand]. They also "took notice that the States might want their militia for defence against invasions and insurrections, and for enforcing obedience to their laws." 2 Farrand 332 (Sherman). And some believed that military power was not "as safe in the hands of eighty or a hundred men taken from the whole continent, as in the hands of two or three hundred taken from a single State." 2 Farrand 386 (Gerry).

²⁴ Among those who originally favored federal control were Madison, who proposed that power over the militia should be transferred entirely to the national government, the "authority charged with the public defense," 2 Farrand

limit the federal government's power over the militia does not address the central issue in this case: whether this compromise created a constitutional definition of "militia" applicable to the NGUS and superior to Congress's assertion of its Army Clause powers.²⁵

The Army Clause too was a subject of debate at both the Convention itself and during the ratification process. As with the Militia Clauses, some were suspicious of federal power: Elbridge Gerry, for example, "thought an army dangerous in time of peace and could never consent to a power to keep up an indefinite number." 2 Farrand 329.²⁶ Others, however, believed that the Nation would not be able to defend itself if the federal government were not given broad power to create an army and navy. Alexander Hamilton, who had served on Washington's staff during the Revolutionary War, persuasively argued in *The Federalist* No. 25 that maintenance of a standing Army was essential to the Nation's survival. Although the militia "by their valor on numerous occasions, erected eternal monuments to

332 (remarks of Madison), and Hamilton, who advanced a proposal that would have given the federal government primary control over the militia, see J. Madison, *Notes of Debates in the Federal Convention* 164 (Hunt ed. 1987). Others "saw no room for . . . distrust of the Genl Govt," 2 Farrand 331 (Pinkney), and were "more apprehensive of the confusion of the different authorities on this subject than of either." 2 Farrand 331 (Langdon). They believed that national authority over the militia was necessary because "the Militia were every where neglected by the State Legislatures." 2 Farrand 387 (Randolph).

²⁵ Amicus National Guard Association of the United States argues that requiring training of the NGUS in Central America was simply the prescription of "discipline" permitted by the Militia Clauses. Because the NGUS is not a Militia Clause organization, Amicus errs in limiting Congress's power over the NGUS to the prescription of discipline. See note 40, *infra*. In any event, it is at best unclear that the term "discipline" was intended to have such a broad meaning. See 2 Farrand 385 (referring to "discipline" as "the manual exercise evolution &c").

²⁶ See also 2 Farrand 509 (Gerry), 616-617 (Mason, Madison); 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 136 (Nason) (2d ed. 1854) [hereinafter *Elliot's Debates*]; 3 *Elliot's Debates* 51 (Henry), 169 (Henry), 380 (Mason).

their fame," reliance on them as the "natural bulwark" of the "national defense . . . had like to have lost us our independence."²⁷ *The Federalist* No. 25, at 166 (C. Rossiter ed. 1961). Hamilton further noted that, because "[w]ar . . . is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice," it can be conducted "against a regular and disciplined foe only by a force of the same kind." *Ibid.*

Ultimately, the federalist view prevailed in the drafting and ratification of the Army Clause. In contrast to the carefully delineated division of powers of the Militia Clauses, the Army Clause contained only a single qualification—the requirement that appropriations for the Army be for no more than two years. Even that provision conferred no powers over the national defense on the States.²⁸

²⁷ Hamilton's words echo a letter written by Washington in 1776, in which he complained that "[i]f I was called upon to declare upon Oath . . . whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter." See Wiener, *The Militia Clause of the Constitution*, 54 *Harv. L. Rev.* 181, 183 (1940).

²⁸ Hamilton articulated the classic defense of the decision to grant Congress broad powers in the Army Clause:

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

. . .

Whether there ought to be a federal government intrusted with the care of the common defense is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow that that government ought to be clothed with all the powers requisite to the complete execution of its trust. And unless it can be shown that the

In view of the broad powers granted to Congress by the Army Clause, petitioners must advance some persuasive reason why those powers may not be used to create and maintain the NGUS. Repetition of the limitations embodied in the Militia Clauses is not enough to justify the wholesale limit on Congressional power to create an armed forces reserve that petitioners advocate.

2. Petitioners assert that the NGUS should be subject to the Militia Clauses because those Clauses were "intended as a check against the possibility of federal oppression." Pet. Br. 20. For support, they cite Madison's argument in *The Federalist* No. 46 that, if a "regular army, fully equal to the resources of the country, be formed" and set against the people of a State, the State would be able to defend itself with "a militia * * *, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence." *The Federalist* No. 46, at 299 (C. Rossiter ed. 1961).²⁹

circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the National Forces.

The Federalist No. 23, at 153-154 (C. Rossiter ed. 1961) (emphasis omitted).

²⁹ Petitioners also cite Hamilton's statement in *The Federalist* No. 29 that the militia would provide the "best possible security" against a standing army. *The Federalist* No. 29, at 184-185 (C. Rossiter ed. 1961). Pet. Br. 20; see also Pet. App. A29 & n.18. Hamilton's argument, however, was not that the militia would provide a force that could be militarily pitted against a standing army. Rather, his point was that a well-governed militia would limit or eliminate the need for Congress to maintain a large standing army. Thus, immediately before the quoted words, Hamilton stated that the militia was "the only substitute that can be devised for a standing army." *The Federalist* No. 29, at 185 (Rossiter ed. 1961) (emphasis added). Elsewhere in *The Federalist* No. 29, Hamilton argued that federal power over the militia "ought, as far as possible to take away the inducement and the pretext" to a large standing army and would enable the federal government to "dispense with the employment" of a

Fears that a federal standing army could be employed to conquer a State were no doubt exaggerated at the time the Constitution was ratified. And unless one embraces the position that the Civil War was wrongly decided, no incident in the Nation's subsequent history suggests that protection of a State from conquest by the federal government ought to be a guiding factor in interpreting the Constitution's allocation of power between the States and the federal government. In any event, the hypothesized interest in state self defense does not support petitioners' bold claim to protection of an entirely separate interest—a State's claimed interest in participating in national foreign and defense policy. This case does not raise the spectre of federal "oppression" to which Madison referred in *The Federalist* No. 46.³⁰

3. Finally, petitioners assert that "state control over the militias was designed as a check on federal military adventurism." Pet. Br. 20. Indeed, the threat that a state militia under federal control might be sent to a distant State for an unidentified purpose did surface in the ratification debates and was carefully answered by Madison.³¹ But it is noteworthy that,

standing army. *Id.* at 183. He concluded that "[t]o render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions on paper." *Ibid.* Ironically, petitioners here object to Congress's effort to create the NGUS as a reserve force to limit the size of the standing army.

³⁰ It is difficult to conceive of circumstances today in which fear of a federal occupying army illegally conquering a State would have any substance. However, we note that, even if there were a legitimate state interest in protecting itself against such an eventuality, the current statutory scheme provides authority for the States to organize state defense forces pursuant to 32 U.S.C. 109(c).

³¹ In Maryland, it was urged that Congress would use its power over the militia to "march the whole militia of Maryland to the remotest part of the Union, and keep them in service as long as they think proper." 3 Farrand 208 (Martin). In response to concerns of this type, Madison emphasized that the political structure of the federal government would make it unlikely that Congress's power over the militia would be abused by, for example, "drag[ging] the militia unnecessarily to an immense distance." 3 Elliot's Debates 381-382. Such abuses would be unlikely from "a government of a federal nature, con-

although a wide variety of reasons were given for state control of the militia, there was no recorded sentiment in favor of state control on the ground that States ought to have a means to influence the Nation's foreign or defense policy. In short, there is no evidence that the "military adventurism" feared was the training on foreign soil of federal troops who may one day be called upon to fight there. Nor is there any reason to believe that state power over the militia was to be the sole exception to the Framers' decision to vest power over foreign affairs and national security exclusively in the federal government.³² See also *United States v. Pink*, 315 U.S. 203, 233 (1942) ("[p]ower over external affairs is not shared by the States"); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936).

D. The History Of The NGUS/National Guard System Demonstrates Congress's Intent To Create A National Reserve Force, In Reliance Upon This Court's Holding In The Selective Draft Law Cases

Petitioners assert that the Montgomery Amendment is "a departure from careful observance of the constitutionally mandated state character of the militia by Congress." Pet. Br. 26. This is a revisionist understanding of the pertinent history. Indeed, over a half century ago, it had become clear to Congress that a reserve force subject to the constraints of the Militia Clauses was inadequate for national security purposes. Thus, in 1933 Congress took decisive steps to create a reserve force pur-

sisting of many coequal sovereignties, and particularly having one branch chosen from the people." *Ibid.* See also *The Federalist* No. 10 (Madison). Cf. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551 (1985) (quoting Madison's statement that the federal government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments").

³² Even petitioners concede that the Framers "did not * * * intend the states to make positive national policy in the area of defense or foreign relations matters." Pet. Br. 47-48. Accord, *Amici States Br.* 4.

suant to its Army Clause powers and in express reliance on this Court's decision in the *Selective Draft Law Cases*. Far from showing Congressional recognition of petitioners' asserted constitutional imperative to structure the Nation's reserve forces under the Militia Clauses, Congress's actions since at least 1933 reveal precisely the opposite intent—to make use of its Army Clause powers to create a reserve force not subject to the limitations of the Militia Clauses. In any event, Congress's unusually explicit reliance on a particular source of authority—the Army Clause—and on particular decisions of this Court in providing for the security of this country give special force to the Court's recognition that "judicial deference * * * is at its apogee when legislative action under the congressional authority to raise and support armies * * * is challenged," *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

1. *The Militia Act of 1792*. The Militia Act of 1792 (Act of May 8, 1792), ch. 33, 1 Stat. 271—the primary legislation concerning the militia until 1903—represented Congress's first effort to organize the militia. The Act provided generally that every able-bodied white man between 18 and 45 years of age was to be enrolled in the militia and required to equip and arm himself at his own expense. However, the Act imposed no requirements as to training, drills, or musters. An unfortunate consequence of these omissions was that during each armed conflict through the Spanish-American War, the militia proved militarily inadequate to meet the Nation's needs. The militia tended to be poorly organized, inadequately equipped, and insufficiently trained. Moreover, the worrisome possibility existed that the militia might refuse to execute federal assignments if there was uncertainty as to whether the limitations of the Militia Clauses applied. See H.R. Rep. No. 1066, 82d Cong., 1st Sess. 2-5 (1951); Wiener, 54 Harv. L. Rev. at 187-193; note 16, *supra*.

2. *The Dick Acts of 1903 and 1908*. In 1903, Congress enacted the Dick Act, Act of Jan. 21, 1903, ch. 196, 32 Stat. 775, to remedy some of the deficiencies of the militia system. See H.R. Rep. No. 1094, 57th Cong., 1st Sess. (1902); S. Rep. 2129, 57th Cong., 2d Sess. (1902). See also H.R. Rep. No. 1066,

supra, at 2-5; Wiener, 54 Harv. L. Rev. at 193-195. The Dick Act provided for an organized militia, to be known as the National Guard, that would be equipped through federal funds, be trained by Regular Army instructors, and conform to the Regular Army organization. Under the Dick Act, the National Guard could be ordered into federal service, however, only in the three situations enumerated in the Militia Clauses. The National Guard was then, as it is now, a Militia Clause organization. Like its forerunner, the Act made no provision for an organization comparable to the NGUS.

In 1908, Congress passed the Second Dick Act (Act of May 27, 1908) ch. 204, § 4, 35 Stat. 400, which purported to make National Guard units available for extraterritorial service. By permitting the President to summon the Guard for federal service "either within or without the territory of the United States," § 5, 35 Stat. 400, the Act authorized the federal government to use Guardsmen to meet the type of military situations that in 1846 (the Mexican-American War) and again in 1898 (the Spanish-American War) had necessitated resort to volunteers. See H.R. Rep. No. 1067, 60th Cong., 1st Sess. (1908); S. Rep. No. 630, 60th Cong., 1st Sess. (1908).

The constitutionality of the Second Dick Act was never judicially tested. Following its enactment, however, Attorney General Wickersham rendered a formal opinion that, because the National Guard remained a militia, there was no constitutional warrant for the Act's provision permitting use of the National Guard for general military purposes outside national boundaries. See 29 Op. Att'y Gen. 322 (1912). This opinion remains as the basis for the view that the Militia Clauses do not permit the militia to be ordered outside the United States. Wiener, 54 Harv. L. Rev. at 188-189.

3. *The National Defense Act of 1916.* In 1916, in response to the concerns articulated by Attorney General Wickersham, as well as military events on the Mexican border and in Europe, see Wiener, 54 Harv. L. Rev. at 199, Congress passed the National Defense Act of 1916 (Act of June 3, 1916), ch. 134, 39 Stat. 166. The 1916 Act dramatically increased federal regulation of the National Guard by dictating its organization and the qualifica-

tions of its personnel.³³ More significantly, however, the Act required Guardsmen to take oaths to obey both the President and their state governor. This dual oath of allegiance was thought to enable the President to draft individual Guardsmen into the army in time of war, thus making them available for service beyond the continental borders. See Act of June 3, 1916, §§ 70, 73, 112, ch. 134, 39 Stat. 201, 211.³⁴ As previously noted, the

³³ The Act reserved to the States the authority to appoint officers of the National Guard as required by the Militia Clauses; significantly, however, the Act prescribed the qualifications for the appointment of such officers, and provided for their recognition by federal authorities and for their removal should they be found disqualified. See Act of June 3, 1916, ch. 134, §§ 74, 75, 77, 79, 39 Stat. 201-202, 202, 202-203. Analogous provisions survive today. See 32 U.S.C. 301, 307-310, 323-324. The Act also required the Guard to train more extensively, and it provided that the Guard was to receive federal pay for armory drills, administrative work, and field encampments. Act of June 3, 1916, §§ 92, 109, 110, 39 Stat. 206, 210. Finally, the Act provided that the Guard was to be organized so as to form complete tactical units in conformity with the organization of the Regular Army. §§ 60, 64, 39 Stat. 197, 198-199.

³⁴ One commentator suggested that the draft provisions of the 1916 Act were unconstitutional because the taking of the federal oath of allegiance by members of the militia

would seem to constitute an express waiver of their constitutional right to object to a draft for other than the constitutionality specified purpose [provided in the Militia Clauses]. Congress accomplishes this result by using its constitutional power to organize the militia to abolish the constitutional limitations placed on its use of the militia. A state is given the choice of having no militia or one unprotected by constitutional guarantees. The net result is that the old sort of militia, known to the Constitution, is to be done away with.

Note, *The Status of State Militia Under the Hay Bill*, 30 Harv. L. Rev. 176, 178-79 (1916).

This view, however, was rejected by the House Military Affairs Committee, see H.R. Rep. No. 297, 64th Cong., 1st Sess. 2-9 (1916). Its weak point, stated a contemporary commentator, was the assumption that members of the militia could not be drafted into the Army and thus become available for general military service:

A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or reserve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? An organized militiaman is no less a citizen and is much better prepared,

Court in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox v. Wood*, 247 U.S. 3 (1918), upheld Congress's power under the Army Clause to draft members of the militia into active duty service on behalf of the United States.

4. *The National Defense Act of 1933*. The National Defense Act of 1933 ch. 87, 48 Stat. 153, created the NGUS and the dual enlistment system. The state National Guard remained subject to the Militia Clause. See H.R. Rep. No. 141, 73d Cong., 1st Sess. 4 (1933). Congress, however, expressly exercised its Army Clause power in creating the NGUS as a reserve component of the national armed forces. H.R. Rep. No. 141, *supra*, at 3. In keeping with Congress's assessment of the Nation's security needs in the mid-1930's, the NGUS was to be available only in wartime.³⁵ Significantly, however, the Act did not require the consent of any state authorities to order the NGUS to active duty; indeed, there is no discussion of such a provision in the Congressional reports.

largely at Federal expense, to make an effectual contribution to the country's cause in time of war.

Ansell, *Status of State Militia Under the Hay Bill*, 30 Harv. L. Rev. 712, 723 (1917).

³⁵ Section 5 of the statute provided that "in time of peace, [the members of the NGUS] shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States." 48 Stat. 156, 32 U.S.C. 4a (1934), repealed, Armed Forces Reserve Act of 1952, ch. 608, § 803, 66 Stat. 505. Congress's decision that, under the political and military situation facing the nation in 1933, the NGUS would be needed only in a war does not suggest that Congress believed that, as a matter of constitutional law, the NGUS could only be available under such circumstances. Still less does it provide any basis for petitioners' argument that today, long after this limitation was removed from the statute, the Court should require such a limitation as a matter of constitutional law. Pet. Br. 37-38. As we discuss below, see *infra* at 42-46, petitioners' entirely novel theory that the Militia Clauses can be "trumped" by the Army Clause only in the event of a war or national emergency appropriately declared by Congress or the President has no basis in the text or history of the Constitution. There is in addition no mention of this theory in the legislative history of the 1933 Act, nor is there any indication whatsoever that Congress limited use of the NGUS to wartime to avoid perceived constitutional objections.

Congress's stated purpose in creating the NGUS was to make it available for federal duty outside the limitations of the Militia Clauses—as the *Selective Draft Law Cases* permit—but in a manner that obviated the need to draft National Guard members individually. H.R. Rep. No. 141, *supra* at 4-5. The legislative history shows unusually explicit reliance by Congress on this Court's construction of the Army and Militia Clauses in the *Selective Draft Law Cases*. See S. Rep. No. 135, 73d Cong., 1st Sess. 2 (1933); H.R. Rep. No. 141, 73d Cong., 1st Sess. 1-6 (1933).³⁶ The basic assumption underlying the current structure of the armed forces—that the NGUS will be available to assist in whatever military missions must be carried out, regardless of the specific limitations in the Militia Clauses—is thus rooted in Congress's reliance on the broad interpretation of the Army Clause in the *Selective Draft Law Cases*.

5. *The Armed Forces Reserve Act of 1952*. Following World War II and during the Korean Conflict, Congress enacted the Armed Forces Reserve Act of 1952 to strengthen the reserve components of the Armed Forces. See Act of July 9, 1952, ch. 608, 66 Stat. 481. This Act further integrated the NGUS into the structure of the armed forces.

³⁶ For example, H.R. Rep. No. 141, *supra*, at 3, concludes:

[T]here is no constitutional or legal objection to the creation through appropriate amendments of the National Defense Act, of the "National Guard of the United States" as a reserve organization of the Army of the United States, under the Army provisions of the Constitution, leaving the National Guard of the States, Territories, and the District of Columbia, organized under the militia provisions of the Constitution, intact and unaffected by such amendments.

This conclusion was based directly upon this Court's decision (H.R. Rep. No. 141, *supra*, at 4):

The constitutional and legislative validity of the amendment to the National Defense Act to be proposed * * * is established by the decisions of the Supreme Court of the United States. (*Tarble's case*, 60 U.S. (13 Wall.) 397, 408; *Arver v. United States*, (selective draft cases), 245 U.S. 366.).

The Report went on to quote extensively from the *Selective Draft Law Cases* opinion.

For present purposes, the most significant feature of the 1952 Act was its modification of the circumstances under which the NGUS could be ordered into active duty. The provision of the 1933 Act limiting activation of the NGUS to wartime was eliminated. 66 Stat. 505; see note 35, *supra*. In its place, the statute added 10 U.S.C. 672(b) and (d), the provisions at issue in this case. These provisions permit use of the NGUS for any purpose—not merely training—without regard to the existence or declaration of a war or national emergency. These provisions thus contrasted sharply with the provisions governing federalization of the National Guard, which are limited to the situations enumerated in the Militia Clauses.

The 1952 Act was the first statute governing the NGUS containing a gubernatorial consent provision.³⁷ Although Congress had passed a series of statutes between 1933 and 1952 governing activation of the NGUS, none required gubernatorial consent.³⁸ In particular, although one provision expressly authorized activation of the NGUS for *training*, there was no mention of any right of a governor to consent or veto activation of the NGUS for this purpose.³⁹ In light of this provision, petitioners' assertion that the Montgomery Amendment marked the first time that the "reserved authority for militia training" was not observed is off target. See, *e.g.*, Pet. Br. 30.

³⁷ Although questions concerning the constitutionality of the bill were raised at the hearings, see *Reserve Components: Hearings on H.R. 4860 Before the House Comm. on Armed Services*, 82d Cong., 1st Sess. 475-76, 482-83 (1951), the gubernatorial consent provision itself was never mentioned. See *id.* at 788, 798.

³⁸ See Act of June 19, 1935, ch. 277, 49 Stat. 391 (amending Section 38 of the National Defense Act of 1916 to provide for activation of the NGUS in a national emergency for not more than 15 days unless the emergency was declared by Congress, with no provision for gubernatorial consent); Act of June 15, 1933, ch. 87, § 38, 48 Stat. 155 (amending Section 38 of the National Defense Act of 1916 to authorize activation of NGUS officers for service in the general staff or the National Guard Bureau, with no provision for gubernatorial consent).

³⁹ See Act of March 25, 1948, ch. 157, § 5(a), 62 Stat. 90, amending Section 92 of the National Defense Act of 1916 (39 Stat. 206) to authorize training for the NGUS on the same basis as for the Organized Reserve Corps. Cf. S. Rep. No. 625, 80th Cong., 1st Sess. 4 (1947).

6. *The Montgomery Amendment.* Between 1952 and 1986, when Congress enacted the Montgomery Amendment, 10 U.S.C. 672(f), the role of the NGUS in the Nation's defense structure became even more significant. As the Nation's global responsibilities grew, reliance on non-active duty forces, including the NGUS, increased. As former Assistant Secretary of Defense James Webb testified, under the "Total Force" concept, which has governed strategic planning since the early 1970's, the national security increasingly depends on the ability to "mobilize, deploy and employ" NGUS units anywhere in the world where military force is needed J.A. 13. See also H.R. Rep. No. 1069, 94th Cong., 2d Sess. 3-5 (1976). Given the global responsibilities assigned to the NGUS, "effective and realistic training throughout the world is a necessity * * * owed to those guardsmen who will be committed to the battlefield, to enhance their proficiency and ability to fight and survive." J.A. 13. Accordingly, by 1985, more than 39,000 NGUS troops annually were being trained overseas in more than 44 different countries. J.A. 20.

The Montgomery Amendment is simple and straightforward—it prohibits a governor from withholding consent to a NGUS member or unit being ordered to active duty for service outside the United States "because of any objection to the location, purpose, type, or schedule of such active duty." By the time the Montgomery Amendment was enacted, the role of the NGUS as a full-fledged component of the national armed forces was well-established. As Rep. Montgomery explained during the debate, the NGUS cannot be assigned crucial overseas missions "[i]f the Defense Department has to worry about whether a Governor is going to block his or her units from going to training exercises in Europe or elsewhere." 132 Cong. Rec. 21,660 (1986). Far from marking a break with past tradition, therefore, the Montgomery Amendment follows directly from the decision to create the NGUS as an Army Clause organization available for any mission that may be carried out by this Nation's military forces.

E. *Petitioners' Suggestion That the Federal Government May Contravene The Limitations Of The Militia Clauses Only After Declaration Of A War Or National Emergency Has No Support In The Constitution's Text or History*

The claim that the Constitution requires that the NGUS be treated as a "militia" leads to the conclusion that the federal government may use the NGUS only for the three purposes enumerated in the Militia Clauses—to execute federal law, repel invasions, and suppress insurrections. What is more, under this view the federal government may not train the NGUS at all, even for use in the three Militia Clause-sanctioned circumstances. This is a pivotal deficiency of petitioners' claim, since it essentially renders impossible the objective of the dual enlistment system—combining the federal need to maintain a sizeable armed forces reserve at federal expense with the States' desire to maintain state militia forces at virtually no cost to themselves. In short, if the federal government cannot achieve its objective of maintaining the NGUS as a genuine armed forces reserve, available for any military mission to which it may be assigned, there would be no point to the creation of the NGUS and the maintenance of the dual enlistment system.⁴⁰

⁴⁰ This view is a necessary consequence not only of the position advanced by petitioners in this litigation, but also of the position advanced by the amicus National Guard Association of the United States. Amicus argues that the authority of Congress to discipline the militia pursuant to the Militia Clauses is "broad enough to encompass orders for National Guard units to conduct peacetime training missions overseas," see Motion of Amicus for Leave to Participate in Oral Argument at 4 (filed February 23, 1990). The argument erroneously presupposes that the National Guard was ordered to train in Honduras; in fact, it was the NGUS that was ordered to so train. More importantly, however, the argument suggests, as does that of petitioners, that federal control of the NGUS is governed by the Militia Clauses, which include the restrictions of Clause 15 on permissible uses of the militia. Although amicus argues that the "case can and should be resolved without ever reaching the much broader Army Clause argument raised by the federal government," *id.* at 5, to decide the case on the grounds advanced by amicus would necessarily be to proceed on the mistaken assumption that the NGUS is a "militia" under the Constitution. It is emphatically not. The case thus squarely raises the question of whether the NGUS must constitutionally be treated as "militia," and this Court should decide the case on that ground.

Apparently recognizing that this result of their position is unacceptable, petitioners seek to escape it by adopting the view of the dissent below that "before the federal government can exercise its army power to supersede the reserved state authority over the militia, its actions must be motivated by a 'national exigency' " that must be identified in an "affirmative declaration" by Congress or the President. Pet. App. A41-A42; see also Pet. Br. 10, 21, 21 25-26, 33-37. This is entirely made up. Petitioners' novel constitutional theory is without a shred of support in the text or history of the Constitution. It should be firmly rejected.

Petitioners' theory has two components, both of which are implausible. First, the theory requires that the three purposes enumerated in Clause 15 be construed merely as specific illustrations of a generic "exigent circumstances" requirement for which the militia could be called out. Second, and even more unlikely, petitioners' theory implies that the Constitution itself imposes a specific procedural requirement—"an affirmative declaration"—that must be met by Congress or the President before the full scope of federal powers under the Army Clause can be exercised.

1. The text of the Constitution lends no support to the theory that the three enumerated purposes in Clause 15 should be read to refer more generally to any "national exigency." Clause 15 refers in specific terms to three particular circumstances. There is no mention of the word "exigency" or "emergency" in the Militia Clauses. Although there is undoubtedly room for debate over the scope of the specific terms used in Clause 15—and, in particular, over the scope of use permitted under the category of "repelling invasions"—there is nothing in the text to suggest that the specific terms of the Militia Clauses, which after all were a carefully crafted compromise between those who feared national power and those who believed that the national government must be in full control of all military forces, ought to be ignored.

Nor does the text of the Constitution lend any support to the procedural requirement that a national emergency must be declared before the militia may be used for a purpose not specified in Clause 15. In the rare instances in which the

Framers sought to impose procedural requirements on the exercise of particular powers, they did so in specific terms. See Art. I, § 3, Cl. 6 (Senate shall be on oath when trying any impeachment); Art. I, § 9, Cl. 7 (statement of receipts and expenditures shall be published from time to time); Art. II, § 1, Cl. 8 (oath prescribed for President). In interpreting one of the Constitution's affirmative grants of power, it is inappropriate for the Judiciary—absent specific constitutional warrant—to require that Congress or the President engage in a particular procedural exercise before they are permitted to employ powers conferred upon them by the Constitution.

2. In support of their creative position concerning the necessity for a declared national emergency, petitioners quote a number of passages from the Framers to the effect that the federal government's authority would be "most extensive and important in times of war and danger," *The Federalist* No. 45, at 293 (Madison) (C. Rossiter ed. 1961); that the impossibility of foreseeing future "natural exigencies" rendered it necessary that "there can be no limitation of that authority which is to provide for the defense and protection of the community," *The Federalist* No. 23 at 154 (Hamilton); and that the militia would be prepared "for every military exigency of the United States," 12 J. Sparks, *The Writings of George Washington* 39 (1839). See Pet. Br. 25-26, 43.

Quotations of this kind are undoubtedly helpful in providing guidance in the interpretation of problematic portions of the constitutional text. But general statements of purpose do not supersede the particular terms of constitutional provisions. None of the passages invoked by petitioners addresses the question whether the specific terms of Clause 15 should be ignored in favor of a general "national exigency" requirement. Moreover, it is mistaken to argue that the Hamilton quotation, indicating that Congress's Army Clause powers are broad in order to confront national emergencies, entails the conclusion that Congress's Army Clause powers are weak in instances in which no national emergency has been declared. The plenary power granted to Congress by the Army Clause, see, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 70-72 (1981); *United States v. O'Brien*,

391 U.S. 367, 377 (1968), gives Congress the ability to deter war by preparing for it in advance, not simply the power to respond to aggression after the fact.

3. Finally, petitioners assert that this Court's decision in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), requires that the broad Army Clause power can be employed only in the event of declared war or national emergency. In support of this assertion, petitioners seize upon the Court's statement that "[t]he duty of exerting the [Army Clause] power * * * was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play." 245 U.S. at 382-383 (emphasis added).

Petitioners' reading of the *Selective Draft Law Cases* is mistaken. The Court indeed referred to "exigencies," as did Hamilton in the passage discussed above, to justify the breadth of the Army power. But the Court, like Hamilton, did not believe that the Army Clause powers were limited to such circumstances. In the very passage cited, the Court indicated that it was for Congress—not the Judiciary—to determine when the needs of national security justified exercise of the Army Clause power. In this case, Congress has determined that national security interests require a broad delegation of authority to the President to activate the NGUS for training or other purposes under 10 U.S.C. 672(b) and (d), so that the "exigency" of aggression may be deterred or, if deterrence is not possible, confronted. There is no warrant in the *Selective Draft Law Cases* to impose any additional requirements on the exercise of the federal government's powers.⁴¹

⁴¹ Petitioners also cite the Court's statement that the Militia Clauses "diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise," 245 U.S. at 383, as support for the proposition that Congress could only exercise its Army Clause powers over the NGUS where a "strict necessity," i.e., a declared national exigency, existed. Far from limiting the use to which Congress may put the militia, the Court in this passage was explaining that the availability of the militia may make it unnecessary for the federal government to maintain a large standing army. Nothing in the passage suggests that Congress's decision to employ its Army Clause powers is limited to situations in which it has declared a national exigency.

The *Selective Draft Law Cases* arose, of course, during World War I. The great conflagration thus provided the dramatic backdrop against which the Court's opinion was fashioned. Petitioners' effort to interpret the Court's opinion in those cases to require the existence and declaration of a national exigency before Congress may fully employ its Army Clause powers is essentially an attempt to confine the *Selective Draft Law Cases* to their facts. That will not do. Simply as an interpretation of the Court's opinion, petitioners' suggestion is implausible. But in addition, it ignores the fact that Congress has expressly relied on the broad reaffirmation of its Army Clause powers in the *Selective Draft Law Cases* to structure the armed forces on which the security of this Nation depends. See pp. 38-39, *supra*. In light of this reliance, it would be particularly inappropriate now to reconsider this Court's settled precedents from over seventy years ago.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Army Clause (U.S. Const. Art. I, § 8, Cl. 12) provides:

[The Congress shall have Power] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; * * *.

The Militia Clauses (U.S. Const. Art. I, § 8, Cls. 15 and 16) provide:

[The Congress shall have Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *.

10 U.S.C. 672(b) and (d) provide:

§ 672. Reserve components generally

* * * * *

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory or Puerto Rico or the commanding general of the District of Columbia National Guard, as the case may be.

* * * * *

(1a)

- (d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriation authority of the State or Territory, Puerto Rico, or the District of Columbia, whichever is concerned.

* * * * *

The Montgomery Amendment, 10 U.S.C. 672(f), provides:

- (f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

(11)
No. 89-542

Supreme Court, U.S.
FILED

MAR 15 1990

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CLERK

In The
Supreme Court of the United States
October Term, 1989

RUDY PERPICH, as Governor of
The State of Minnesota,

and

THE STATE OF MINNESOTA,
by its Attorney General
Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT
OF DEFENSE, et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

RESPONDENTS' THEORY THAT THE ARMY CLAUSE IS LIMITLESS IN ITS POWER, THEREBY GIVING CONGRESS AUTHORITY TO NULLIFY THE MILITIA CLAUSES, IS HISTORICALLY INACCURATE, UNNECESSARY, AND FAR-REACHING IN ITS EFFECT.

Respondents' arguments in support of the constitutionality of the Montgomery Amendment, 10 U.S.C. § 672(f), rest on the theory that the army clause is not limited by the militia clauses. It is a theory that would permit unrestricted federal authority over peacetime training of the National Guard. This theory, rejected in 1986 by the then Chief of the National Guard Bureau (NGB) and the NGB's legal advisor, is based solely on an overreaching and erroneous interpretation of the *Selective Draft Law Cases*, 245 U.S. 366 (1918).

Respondents do not challenge the State of Minnesota's position that the Montgomery Amendment disregards the unambiguous text of the militia training clause and its purpose, which was to limit federal authority in peacetime. Respondents' argument – that the dual enlistment system properly permits a constitutionally protected state entity, the National Guard, to be "repackaged" as a federal entity, the National Guard of the United States, and thereby be divested at any time of state control over training – is untenable. Respondents' novel theory that state participation in the National Guard is "voluntary" is illusory because the National Guard is the constitutional militia, the only militia organization states are permitted to create.

Respondents' rejection of the declared exigency requirement as a predicate to federal assumption of National Guard training authority in the absence of war disregards the text of the Constitution, the Framers' intentions, case precedents and legislative history. Respondents also fail to make a persuasive showing that unlimited federalization of the National Guard is necessary or that the dual enlistment system and the "Total Force" concept is threatened in any way by adhering to the settled understanding that governors are constitutionally entitled to withhold consent to militia training during peacetime in the absence of a national emergency.

A. Respondents Argument Rests Solely On An Erroneous Interpretation Of the Selective Draft Law Cases.

The central premise of respondents' position is that army clause power is plenary and can be used to nullify the militia clauses. This premise rests squarely on respondents' interpretation of the *Selective Draft Law Cases*, an interpretation that is overreaching and erroneous.¹ Properly read, the *Selective Draft Law Cases* provide no support to respondents and, therefore, the foundation for their entire argument crumbles.

There are three reasons why respondents' reliance on the *Selective Draft Law Cases* is misguided. First, the *Selective Draft Law Cases* simply cannot be separated from the dramatic context in which the decisions were written. The decision upheld the power of Congress to draft soldiers during World War I. Its strong and expansive words were undoubtedly intended to send a message to a world at war. Congressional power during a declared war is at its zenith. This Court has held that the power to wage war is the power to wage war successfully. *Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948) (citation omitted). This power, "absolutely essential to the safety of the Nation, is not destroyed or impaired" by the other provisions of the Constitution. *Id.* at 781.²

Second, the *Selective Draft Law Cases* did not involve training of the militia, a right explicitly reserved to the states in the Constitution. Indeed, the Solicitor General, in arguing

¹ Respondents also rely for support for their interpretation on the companion case of *Cox v. Wood*, 247 U.S. 3 (1918). Petitioners' analysis of the relevance of the *Selective Draft Law Cases* applies equally to *Cox*.

² See also *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right"); *Korematsu v. United States*, 323 U.S. 214, 220 (1944) ("when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger").

for the validity of the statute, advised the Court that the statute "recognized and safeguarded" state authority over training. 245 U.S. at 372.³ It is simply unpersuasive for respondents to pin their argument on a decision so unrelated to the context and legal issue presented here.⁴

Third, even if the *Selective Draft Law Cases* is relevant to deciding this case, its language supports petitioners' view of the proper interplay between the militia and army clauses. In the *Selective Draft Law Cases*, the Court cautioned against confounding "distinct and separate" areas of federal and state authority within the army and militia clauses "to the end of confusing both the powers and thus weakening or destroying both." *Id.* at 384. One of the "distinct and separate" areas of state authority under the militia clauses recognized by the Court is state authority in "carrying out" militia training. *Id.*

³ Respondents apparently argue that the *Selective Draft Law Cases* is relevant to this action because it involved conscription of members of the unorganized militia. Resp. Br. at 19 n.11. However, the unorganized militia is nothing more than the civilian able-bodied male population between the ages of 17 and 45 who are not members of the National Guard. 10 U.S.C. § 311. Because federal law prohibits the states from maintaining a functioning militia other than the National Guard, 32 U.S.C. § 109(a), the unorganized militia is a militia in name only, having no statutory duties. See *infra* at 12-13.

⁴ This position was endorsed by federal authorities at the time what became the Montgomery Amendment was proposed. The Office of Legal Advisor in the National Guard Bureau concluded that the *Selective Draft Law Cases* "has no bearing on the Militia Clause as it pertains to peacetime training of the National Guard." National Guard Bureau, Office of Legal Advisor Memorandum at 20; Pet. Reply Br. App. (hereinafter "App.") at 26.

The memorandum prepared by the Office of Legal Advisor, National Guard Bureau, was recently obtained upon petitioners' request to the U.S. Senate Armed Services Committee. Petitioners understand that the memorandum and other material contained in the appendix to this reply brief are part of the public unpublished record of a hearing conducted by the Committee's Subcommittee on Manpower and Personnel on July 15, 1986.

at 383. This area of authority was reserved to the states in the absence of "strict necessities" or "exigencies" requiring Congressional exercise of its army clause power. *Id.* at 382-83.

Respondents' construction of the *Selective Draft Law Cases* as recognizing a limitless army clause simply does not square with the language of the decision cautioning against weakening a constitutional power. Properly construed, the *Selective Draft Law Cases* stands for the proposition that undiminished authority over military forces is conferred on Congress by the army clause during "exigencies" or "strict necessities." But this power should not be confused with the "distinct and separate" reserved state authority to train the militia at all other times.

This interpretation of the decision reflects the canon of constitutional construction that when "fundamental principles [of the Constitution] are of equal dignity, neither must be so enforced as to nullify or substantially impair the other." *Dick v. United States*, 208 U.S. 340, 353 (1908). Thus, upon reviewing proposed legislation which ultimately became the Montgomery Amendment, the National Guard Bureau's (NGB) Office of Legal Advisor correctly concluded: "[Congress] may not interpret the 'Army' clause to nullify or impair the clear intent of the 'Militia' clause as to training of Guard unit[s] and members." National Guard Bureau, Office of Legal Advisor Memorandum at 22; Petitioners' Reply Br. App. (hereinafter "App. ____") at 28.

B. Respondents' Theory Ignores The Clear Historical Understanding Of The Meaning Of The Militia Clauses.

Respondents' claim that history supports its view that Congress may exercise army clause powers to eliminate militia clause protections is deceptive and inaccurate. Perhaps most telling and revisionist are respondents' attempts to ignore the clear and unambiguous intent of the Framers to place limits on the power of the federal government through the militia clauses. Until enactment of the Montgomery Amendment in 1986, the role of the militia clauses as a limit on the

army clause, at least with respect to training, was unchallenged.

Two aspects of respondents' argument are telling. First, and perhaps most profoundly, respondents ignore the text of the Constitution which "reserv[es] to the States respectively . . . the Authority of Training the Militia. . . ." U.S. Const. art. I, § 8, cl. 16 (clause 16). Respondents' theory gives the federal government under the army clause total "authority of training the militia."

Second, respondents make no attempt to distinguish the unambiguous intent of the Framers' work. There is no question that the Framers believed that the militia clauses were a significant limitation on federal authority during peacetime. The federalists did not, contrary to respondents' assertions, secure "virtually unrestricted powers." Resp. Br. at 14. The finely tuned divided militia authority gave plenary militia control to the federal government when the national security was threatened and, in the absence of such a threat, control was given to the states. The compromise clearly did not give the federal government plenary control over the militia at all times and for all purposes. A proposal to that effect was rejected by the Framers. *See* J. Madison, Notes of Debates on the Federal Convention 164 (Hunt 1920) (Hamilton plan). Yet that is precisely what respondents seek to accomplish through their theory in this case. Respondents' discussion of the Framers' intent focuses solely on the army clause and ignores the key issue in this case, which is the extent of the limits placed on Congress' to control the militia in peacetime. While respondents try to characterize petitioners' position as radical and new, it is respondents who depart dramatically from the text and history of the militia clauses.

In commenting on the Framers' intent, respondents assert, without foundation, that fears of federal oppression of the states were "no doubt exaggerated at the time the Constitution was ratified." Resp. Br. at 33. However, there was a substantive basis for the Framers' fears. The state-controlled check on federal oppression of the states was the Framers' reaction to the tyrannical power of the English army. Their structural decision to keep the army small and to rely on

essentially state controlled militia forces for much of the nation's defense has been undisturbed for two centuries.⁵ This basic decision, together with civilian control over the military, has undoubtedly contributed to a relatively peaceful and free domestic experience, almost unique in the modern world.

Respondents question the contemporary vitality of the Framers' decision. They suggest that unless the Civil War was "wrongly decided," basic state control over the militia can no longer serve as a check on the abuse of federal military power. Resp. Br. at 33. However, neither that war nor the subsequent constitutional amendments diluted or limited the Constitution's explicit grant of state authority over the militia or undermined the purpose of this authority as a check on the abuse of federal military power.

Respondents, again seeking to question any modern application of the Framers' decision, assert that the Framers only discussed state control over the militia as a check on the abuse of *domestic* military adventurism, not *foreign* military adventurism. Resp. Br. at 33-34. This is not a significant observation. The Framers' discussion of military adventurism focused on a domestic context only because the nation was isolationist and did not foresee foreign entanglements.⁶ There is no evidence that the Framers would have distinguished between domestic and foreign military adventurism.

Amicus National Guard Association of the United States seeks to place a different "spin" on the Framers' intent. It argues that the phrase "discipline prescribed by Congress" in the militia training clause provides a constitutional basis for federal determination of militia training locations. However, if by "discipline" the Framers meant to reserve to the federal

⁵ As this Court noted in *United States v. Miller*, 307 U.S. 174, 179 (1939), "[t]he sentiment of the time [of the ratification of the Constitution] strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through the militia - civilians primarily, soldiers on occasion." See also 32 U.S.C. § 102.

⁶ See W.T. Reveley, *War Powers of the President and Congress* 61 (1981).

government the authority to train, the militia training clause would absurdly be granting state power with one phrase only to take it back with another. In point of fact, the Framers anticipated that "discipline" might someday be expansively construed to erode state training authority. They rejected that notion and guarded against that possibility. At the Constitutional Convention, Delegate Sherman withdrew his motion to delete the training clause after Delegate Elsworth cautioned him that such an action might result in the power to discipline overwhelming the training process. S. Doc. No. 695, 64th Cong., 2d Sess. 35 (1917) (Madison's Notes of the Convention) (*The Militia*). Even if the right to discipline can be construed to include the right to determine training locations, reserved state authority over militia training still entails the right to say "no" absent a threat to the national security.

Respondents further claim that Congress understood in 1933 that it was creating the dual enlistment system to avoid the restrictions of the militia clauses.⁷ Resp. Br. at 39. If so, why did Congress explicitly limit in the Act federal control

⁷ Respondents' arguments that Congress has enacted statutes in the past that contradict petitioners' legal position with respect to the militia clauses is incorrect. The three statutes respondents cite as examples fully comport with petitioners' theory.

The first statute is the Act of June 19, 1935, ch. 277, 49 Stat. 391. It only provided federal authority in a national emergency, a position fully in line with petitioners' position.

The second statute is the Act of June 15, 1933, ch. 87, § 38, 48 Stat. 155. It provides that the President may order NGUS officers to active duty in the National Guard Bureau. The National Guard Bureau is the part of the Department of Defense that coordinates the training and organization of state National Guard units, 10 U.S.C. § 3040. The 1933 statute does not contradict petitioners' theory because the order to active duty is for duty in an administrative agency that coordinates the *training* and *organization* of the state National Guard. Such an order is pursuant to Congress' power to "organize, arm, and discipline the militia."

(Continued on following page)

over the National Guard to wars or declared national emergencies? The reason is that Congress clearly understood that the militia clause required state control over training in the absence of the exigencies described in the Act. The House and Senate reports accompanying the creation of the dual enlistment system indicated clearly that in the absence of a national emergency, control over the militia would remain absolutely with the states. See S. Rep. No. 135, 73d Cong., 1st Sess. 2 (1933), H.R. Rep. No. 141, 73d Cong., 1st Sess. 5 (1933). Moreover, when Congress eliminated the war or declared national emergency limitation in the Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 (The 1952 Act), it replaced that limitation with the provisions which explicitly required gubernatorial consent for federalization of the Guard in the absence of war and national emergency. See 10 U.S.C. § 672(b) and (d). The debate over these provisions indicated that Congress understood that gubernatorial consent was required by the militia clauses of the Constitution. See Pet. Br. at 29-30.

From the founding of the Nation, to the discussion of the interplay of the army and militia clauses in the *Selective Draft Law Cases*, to the consistent unbroken pattern of congressional deference to reserved state authority over the militia embodied in the militia clauses, the Framers, the courts, and the Congress have all respected reserved state authority over the militia – until 1986.⁸ It is respondents' position that radically

(Continued from previous page)

The third statute is the Act of March 25, 1948, ch. 157, § 5(a), 62 Stat. 90. It provides that National Guard members can, "with their consent," be given additional training or other duty. However, National Guard members cannot effectively give consent without authorization of state officials. They are subject to the control of their state commanders. As a result, the consent provisions maintain state control.

⁸ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), does not support the respondents' proposition that the army clause need not accommodate the militia clause. See Resp. Br. at 27 n.21.

(Continued on following page)

departs from the settled course of our Nation's history and traditions.

C. The State's Expressly Reserved Training Authority Over The National Guard Is Not Divested By "Re-packaging" It As The National Guard Of The United States.

Respondents erroneously assert that "[t]his case challenges the constitutionality of the dual enlistment concept. . . ." Resp. Br. at 11. On the contrary, this case challenges the constitutionality of the Montgomery Amendment because it distorts the dual enlistment system. The dual enlistment system requires state National Guard members to simultaneously enroll in the National Guard of the United States (NGUS), a reserve component of the national armed forces. 10 U.S.C. §§ 101(11) and (13), 591(a), 3261, 8261; 32 U.S.C. § 101(5) and (7). It is an essential aspect of traditional military policy of the United States. 32 U.S.C. § 102. The State of Minnesota fully supports dual enlistment and has not challenged the concept in any respect.⁹ Petitioners challenge the Montgomery Amendment because it perverts the dual enlistment system by denying states their constitutional right to maintain a militia. *United States v. Miller*, 307 U.S. 174, 178 (1939) (second amendment gives right to maintain militia).

(Continued from previous page)

The two clauses at issue in that case, the equal protection clause and the commerce clause, were unlike the army and militia clauses, not designed to limit the power of the other.

⁹ See generally State of Minnesota, Department of Military Affairs Biennial Report: 1 July 1985 – 30 June 1987 at 34-35, 44-45, 49(n.d.) (listing numerous overseas deployments of Minnesota Army and Air National Guard).

Under respondents' theory, state National Guard members can, pursuant to the army clause, be ordered to federal active duty for any purpose at any time in their capacity as members of the NGUS. *See* Resp. Br. at 20. Thus, in effect, the reserved state training authority over the National Guard provided in the militia training clause can be negated simply by "repackaging" the National Guard as the NGUS despite the fact that the membership of the two organizations is identical.¹⁰ As a consequence, the check on abuse of national military authority that the Framers intended to provide by reserving state training authority is entirely negated.

This theory of dual enlistment is profoundly wrong. It effectively precludes the states from retaining militia training authority at any time federal authorities wish to preclude it. Congress, under the statutory framework as modified by the Montgomery Amendment and respondents' theory of a limitless army clause, can "relabel" the National Guard, and any other defense force a state may establish, as a federal entity. Thus, under respondents' theory, the federal military can gobble up any number of state defense forces as soon as they are created and strip the states of training authority over them at any time.¹¹ Furthermore, under respondents' theory, state reserved authority in Clause 16 to appoint militia officers can be abrogated if Congress chooses to exercise its limitless army clause power.

Respondents wrongly argue that under their theory, "the Militia Clauses continue to limit federal control over the State National Guard," and the states have "layers of protection" enabling them to deflect federal absorption for the

¹⁰ While it may theoretically be possible for memberships in the National Guard and National Guard of the United States to not be identical under the statutory framework, respondents have identified no such circumstance in the 57 year history of dual enlistment and it seems an extremely remote possibility.

¹¹ States are prohibited from maintaining troops other than National Guard and defense forces authorized by 32 U.S.C. § 109(a). *See infra* at 12-13.

purpose of maintaining order within the state. Resp. Br. at 27. The two identified "layers" are supposedly a limited gubernatorial veto suggested by the legislative history of the Montgomery Amendment and the states' ability to maintain a defense force other than a National Guard. Resp. Br. at 29. However, under respondents' theory, the army clause can always be invoked to abrogate the militia clauses. It is difficult to understand from this how the militia clauses would "limit federal control." Furthermore, under respondents' theory, neither "layer" is constitutionally required and can thus be removed by Congress under its army clause power whenever Congress decides to do so. Thus, the states have no enduring "layers" protecting their peacetime training authority. Reserved express constitutional powers simply cannot be divested through a creative "repackaging" of the constitutional militia. This is, in essence, is respondents' novel theory of dual enlistment.

D. The National Guard Is The "Militia" Protected By The Constitution, And The States' Reserved Rights To A Militia Are Not Satisfied By The Authority To Establish "Defense Forces."

Respondents assert a novel theory that state participation in the National Guard is "voluntary" and as a result, states may choose to "withdraw" from the National Guard. States may, according to respondents, establish "defense forces" which satisfy any constitutional right to maintain a militia. However, respondents' position, properly viewed, does not set up a voluntary choice between having a National Guard or some other type of militia. Rather, it puts the states to a "Hobson's Choice:" either either maintain a National Guard and submit to federal control or relinquish any right to keep a militia. It is a choice the federal government cannot force the states to make under the Constitution.

The Second Amendment guarantees to states the right to maintain a militia. *United States v. Miller*, 307 U.S. at 178 (1939) (Constitution, and particularly the Second Amendment insures the "continuation and renders possible the effectiveness of" the militia). Furthermore, this Court has clearly

recognized that "[t]he National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16 of the Constitution." *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46, *vacated and modified on other grounds*, 382 U.S. 159 (1965).¹² In view of these decisions, it is particularly clear that any suggestion that the states could give up their National Guard is simply an argument that the militia could be abolished. Since the states have a right to a militia, Congress cannot force the states to choose between abolishing the militia and agreeing to restrictions not permitted by the Constitution.

State defense forces are not "militia," as the term is used in the Constitution. The militia is a hybrid organization subject to both state and federal control. *Mela v. Callaway*, 378 F. Supp. 25, 28 (S.D.N.Y. 1974). A state militia may be called forth pursuant to U.S. Const. art I, § 8, cl. 15 (clause 15), subjected to plenary federal control, and sent outside of the state. Further when "in the Service of the United States," the militia can be paid, transported and receive medical care from the federal government under the power to "organize, arm and discipline the militia" and to "govern[] such part of [the militia] as may be employed in the Service of the United States." None of these characteristics apply to state defense forces. They expressly "may not be called" into the armed forces. 32 U.S.C. § 109(c). They are to be used only "within the jurisdiction concerned" and may not be paid, transported or receive medical care from the federal government 32

¹² The federal statutory framework also demonstrates that Congress has understood the National Guard to be the organized militia. 10 U.S.C. § 311(a). There is no statutory authority for a state to maintain an organized militia other than the National Guard. 32 U.S.C. § 109(a).

To the extent that respondents may be claiming that the constitutional militia guarantee is satisfied by the existence of an unorganized militia, *see* 10 U.S.C. § 311(b), that clearly is no right at all. The unorganized militia is not an actual military force. Rather, it is a defining feature of every state's population, i.e., able-bodied males between the ages of 17 and 45 who do not belong to the organized militia. *See* 10 U.S.C. § 311.

U.S.C. § 109(d). In short, defense forces bear no resemblance to the militia and are not distinguishable from police forces.

Moreover, even if the defense forces could be construed to be the constitutional militia or made statutorily to resemble the constitutional militia, respondents' sweeping theory of the army clause would allow the federal government to take these forces completely away from the states at anytime for any reason and for any purpose, thus leaving the states again with no forces to satisfy the states' reserved authority protected by the militia clauses of the Constitution. The deceptive nature of respondents' theory is readily apparent here. Respondents assure states that their constitutional protections are guaranteed by establishment of an organization which according to respondents' own theory could be federalized at any time for any reason.

E. Congress' Power To Call The National Guard Into Federal Service When The National Security Is Threatened Is Fully Supported By The Historical Understanding Of The Militia Clauses.

Respondents contend that the requirement that Congress or the President declare a threat to the national security before reserved state authority over the militia is superseded is "entirely made up" and is without "a shred of support." Resp. Br. at 43. To the contrary, it is respondents' theory – that the army clause can supersede the militia clause at will and that there exist no state limits on federal power in the militia clauses – that should be characterized as "entirely made up." Indeed, the concept of requiring an "exigency" or a threat to the national security before federalization of the National Guard under the army clause is central to interpretation of the relationship between the army clause and the militia clauses. The concept is supported by substantial evidence, including the text and structure of the Constitution, the intent of the Framers, and the historical understanding of the meaning of the militia clauses. Respondents' theory, based solely on an erroneous reading of a wartime conscription case, is truly without a "shred of evidence" to support it.

The power to federalize the National Guard when there exists a threat to national security is a power Congress may

exercise pursuant to the army clause. The Framers' understanding of the power to raise and support armies, as interpreted by Hamilton and Madison, indicates that the power was intended to be exclusive and plenary only in the context of a threat to the national security.¹³ There exists no credible evidence that the Framers intended the army power to swallow the militia clause protections except in time of exigency. Absent "exigencies," shared state and federal control was designed as a fundamental structural check on potential abuse of federal military power.¹⁴

Throughout the history of the Nation, each time the subject of the interplay between the army and militia clauses has been addressed by this Court or Congress, the concept of "exigencies" which permit exercise of army clause power is central to the analysis. See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Selective Draft Law Cases*, 245 U.S. 366 (1918); Act of June 15, 1933, ch. 87, 48 Stat. 155 (The 1933 Act). The 1952 Act replaced the exigency concept with gubernatorial consent, an acceptable constitutional alternative. Until 1986 and enactment of the Montgomery Amendment, the concept of "exigencies" or its consent alternative have guided interpretation of the permissible extent of Congress' army power to override the militia clauses. The concept is not "made up;" rather it is the key to understanding the interplay of the army and militia clauses.

Respondents claim that the three limitations to calling forth the militia, in clause 15 would prevent federalization outside of those conditions if petitioners' position were upheld by the Court. That claim is incorrect. Congress' power under the army clause permits federalization to meet a threat to the national security. The existence of an exigency overcomes reserved state authority as embodied in the militia clauses. Congress is simply not acting under its clause 15 powers when federalizing the National Guard pursuant to a

¹³ *The Federalist No. 23* (A. Hamilton) and *The Federalist No. 45* (J. Madison); see discussion in Pet. Br. at 25-6.

¹⁴ See discussion in Pet. Br. at 7-26.

national emergency; it is acting under its army clause powers.¹⁵

Contrary to respondents' claims, the requirement of a threat to the national security imposes no improper extra-constitutional procedural requirements on the federal government. Clause 15 already requires that Congress activate the militia pursuant to three enumerated contingencies. The exigency requirement sets forth no additional procedure. This requirement simply allows Congress to activate the militia under the army clause. Whatever procedural requirements are mandated by a clause 15 call pursuant to its specified contingencies are the requirements which may be used when Congress exercises its army clause power to utilize the militia to deal with a threat to national security.¹⁶

¹⁵ Even if Congress is held to be acting under its clause 15 powers to federalize the National Guard in an emergency, the three conditions need not be read to impose an absolute limitation on Congress' power in such circumstances. At the time of its founding, the Nation was small and of extremely isolationist sentiment. Reveley, *War Powers of Congress* at 61. In this light, it is likely that the three contingencies specified in clause 15 represent those threats to the national security that the Framers could then envision. These categories were likely indicative of the gravity of circumstance necessary to call forth the militia rather than literal limitations on congressional power. See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (using the concept of exigency or threats to the national security interchangeably with the contingencies in clause 15); see Brief for the National Guard Association of the United States, *et al.* at 26 (hereinafter "NGAUS Brief"); Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cinn. L. Rev. 919, 930-42 (1988).

¹⁶ Respondents' argument that petitioners' position would have permitted Governor Faubus to prevent the calling of state National Guardsmen to active duty to defend a federal district court order requiring desegregation is incorrect. Resp. Br. at 22 n.17. The notion that Governor Faubus would have had any authority to resist a presidential call to execute the laws of the United States under clause 15 is without any credible support. Governor Faubus would have no such authority whether the National Guard was called in its militia status or in its Army Reserve Status.

It is respondents' theory that the army clause can supersede the militia clause at will which is entirely unsupportable. This theory cavalierly ignores authority explicitly reserved to the states in the text of the Constitution and the clear intent of the Framers to provide an explicit limit on the abuse of federal military power. It also ignores the consistent congressional historical respect and understanding of state reserved authority over the militia. Respondents' theory is clearly unsupported by facts or law.

G. Unlimited Federalization of the Constitutional Militia Is Far-Reaching and Unnecessary.

The obvious implications of respondents' legal position are far-reaching. Put very simply, respondents' argument that the army clause is plenary and may be used by Congress to nullify the protections of the militia clauses does not stop at the Montgomery Amendment. Respondents' argument, if adopted by this Court, would permit elimination of any state involvement in the constitutional militia in direct violation of the language of Article I.¹⁷ Respondents' position adheres to no discernible limiting principles. It reduces the militia clauses to a dead letter.

Respondents' brief is rife with alarmist warnings that the "Total Force" concept cannot exist without the Montgomery Amendment and that petitioners' position will lead to "severe consequences for the ability of our armed forces to meet the

¹⁷ While petitioners emphatically disagree with the legal conclusion reached by Amicus National Guard Association, its description of respondents' legal position is accurate.

Thus, the hybrid nature of the National Guard does not create a backdoor through which the federal government can obtain units whenever it does not want to be bothered with the restrictions of the militia clauses. The United States is seeking nothing less than to read those restrictions out of the Constitution.

NGAUS Brief at 12.

Nation's defense needs." Resp. Br. at 13, 41. Such suggestions completely ignore the history of the "Total Force" concept and are directly contradicted by the candid statements in 1986 of Lt. General Emmett H. Walker, Jr., then Chief of the National Guard Bureau, a federal agency that coordinates the readiness of the National Guard. Lt. General Walker, in prepared remarks, stated:

The actions of the few governors have not in any way impaired the nation's ability to rely on the National Guard. * * * Readiness has not been effected. * * * The National Guard Bureau maintains that any attempt to change the peacetime control of the Guard is a constitution issue and would require a constitutional amendment not simply legislative. And, even if a legislative remedy were legal, we maintain that the pursuit of such legislation at this time is an overreaction to an operationally insignificant but perhaps politically very embarrassing incident.¹⁸

In response to questioning from members of the subcommittee, Lt. General Walker expressed strong personal views in opposition to removal of the gubernatorial consent provisions:

Senator Levin: General Walker, do you oppose this legislation as unnecessary? Is that the bottom line, your personal opinion is in opposition?

General Walker: Sir, that is exactly the way I feel about it. I do not think we need it. I have no necessity for it to do my job. I just think it is something you are tinkering with that has served us

¹⁸ Presentation by LTG Emmett H. Walker, Jr., Chief, National Guard Bureau Before the Manpower and Personnel Subcommittee, Senate Armed Services Committee (July 16, 1986) (uncleared version) at unnumbered pp. 4-5; App. at 4-6 (hereinafter "Walker Statement"). General Walker testified that some of his prepared remarks were not approved for delivery to the subcommittee. A copy of the uncleared statement was, however, inserted into the unpublished hearing record.

well for years and years and years and that is state control.¹⁹

Respondents' claims directly contradict the Nation's experience under the "Total Force" concept.²⁰ Since Total Force was initiated in 1971, hundreds of thousands of National Guard personnel have trained overseas²¹ with the consent of governors. A mere 48 were kept from training in Central America.²² "Total Force," by any possible measure, has been an unqualified success – without need for the Montgomery Amendment. Respondents' claims rest on a single incident, which they attempt to bootstrap into the outrageous proposition that the Nation's governors will willfully prevent National Guard members from being properly trained if they are given the chance. That proposition is without a shred of support in our Nation's history and defies all logic and common sense.

Respondents similarly claim that the National Guard cannot be properly trained if states retain any authority over the National Guard. In addition to the unchallengeable conclusion that the Constitution guarantees to states the "authority of training the militia," the facts once again do not support this argument. Federal authorities can, and routinely do, train the National Guard with states' consent. States can, and

¹⁹ U.S. Senate Committee on Armed Services, Subcommittee on Manpower and Personnel, June 15, 1986, Hearing Transcript (unpublished) at 134; App. at 33.

²⁰ Indeed, the "Total Force" concept embodies a national policy that is as old as the Constitution. The "Total Force" concept, a small standing federal army bolstered by a much larger reserve force of citizen soldiers, is the type of military organization clearly envisioned by the Framers. See 32 U.S.C. § 102; Court of Appeals Dissenting Opinion at A-18, n.3.

²¹ Lt. General Walker's testimony indicated that in 1986 alone, more than 42,000 Army and Air Guard members were scheduled to train overseas in 46 countries. More than 9,000 members from 43 states and territories were scheduled to train in Central America. Walker Statement, *supra* n.18, at unnumbered p. 2; App. at 2.

²² Walker Statement, *supra* n.18 at unnumbered p. 3; App. at 3.

routinely do, conduct training as specified by federal authorities. Moreover, if federal authorities determine that the lack of National Guard readiness poses a threat to the national security, they can quickly assume plenary control over training. The unassailable fact remains: National Guard members are well-trained and the states have been fully supportive of training.

Respondents' theory acutely demonstrates that the federal military's desire for expediency and appetite for power remains voracious. Respondents' position overplays the *Selective Draft Law Cases*, overthrows consistent historical understandings, exhibits a parade of horrors unsupported by fact, and eliminates an important constitutional protection. Justice Robert Jackson addressed the consequences of distorting constitutional protections in the name of national security. He stated:

The principal then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.

Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting) (footnote omitted).

Petitioners' position preserves the delicate balance so wisely established by the Framers which has served the Nation well for over 200 years. No facts exist which warrant elimination of the militia clauses.

CONCLUSION

For all the foregoing reasons, petitioners respectfully urge this Court to hold that the Montgomery Amendment is unconstitutional.

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BEFORE THE MANPOWER AND
PERSONNEL SUBCOMMITTEE
SENATE ARMED SERVICES COMMITTEE

JULY 16, 1986

(Uncleared Version)

The National Guard, Army and Air, is at the highest level of combat readiness, highest level of full and traditional manning, highest level of equipment fill and highest level of training readiness in its 350 year history. The Guard today provides 46% of the Army's combat units and 70% of the Air Force's fighter-interceptor force and provides the greatest combat readiness return for each defense dollar and training hour expended of all the components, active, Guard and Reserve. This achievement has been accomplished with the Guard under state control - appointing officers, training individuals and units in the U.S. and abroad and providing command emphasis on combat readiness, starting with the Governor and continuing down the chain of command. The Congress has played a major role in providing the resources to the Guard to make these accomplishments possible.

The legislative initiative being considered by this committee proposes to eliminate the Governor, and therefore state control, from the chain-of-command for all overseas training of the Guard. It is being proposed in reaction to the public comments of, and in some cases restrictions placed by, a few Governors on Guard training in Honduras.

App. 2

It is imperative to note that the National Guard Bureau and the National Guard are committed to being full partners in the Total Force and we recognize our responsibility to carry a full partners share. We also stand firmly committed to American policy in Central America and fully believe that training deployments to Central America, like all overseas training is worth while [sic], readiness enhancing and challenging to our soldiers and airmen.

SLIDE 1

I'd like to take a moment now and show you where the Governors stand on Guard involvement in Honduras. Only Massachusetts is totally opposed to training in Central America. Maine, Vermont Ohio and Washington have said they will not permit units to deploy to Honduras and the remaining States shown in yellow have either said they would approve requests on a case by case basis or in other instances would not permit the Guard to train the Freedom Fighters, operate on the Honduran-Nicaraguan border or some similiar [sic] condition.

In 1986, more than 42,000 Army and Air Guard members will train overseas in 46 countries. More than 9,000 Army and Air Guard personnel from 43 states and territories will train in Central America alone.

SLIDE 2

I will now graphically depict for you what states have participated in U.S. activities in Central America this

App. 3

year. In spite of the public comments and political assertions of some Governors concerning regional policy, all but one has or will let his troops participate. The map does not show the Pennsylvania and Nevada Guards' participation in Costa Rica or the Texas and Colorado Guards' participation in Bolivia.

Of the remaining 11 states not participating this year, only Massachusetts' Governor Dukakis has said he would not permit his troops to train in Central America. Of the remaining States shown in white, Mississippi led the guard into the humanitarian airlift business for Central America under the authority of the Denton Amendment, Vermont trained in Panama last year, Louisiana joined Puerto Rico and Florida in starting the major engineer exercises in Central America in 1984 and 1985, and Connecticut units trained in Honduras last year.

The few Governors that have precipitated the proposed bill have stopped a total of 48 people from training in one country - Honduras - not the other 45 countries. Those 48 people constitute .0001 percent of the total deploying force - less people than report to sick call on an average base on any given day, less people than have had to forego scheduled training for employer support reasons and less people than have had to forego participation due to other commitments. Clearly 48 people in comparison to the deploying forces or the entire Guard strength is insignificant in terms of impact.

The proponents of a legislative initiative maintain that the actions of the few Governors have made reliance on the Guard as a part of the Total Force less tenable and

their public pronouncements and actions have adversely impacted combat readiness.

There are two separate and distinct issues that must be addressed. First, are the postulations of the proponents of the bill factual and justified and secondly, but most important, not withstanding the thesis of the proponents, is state control of the Guard not mandated by the Constitution; does the Constitution not reserve to the States the authority of training the Guard.

We must first address the postulation of the proponents of the initiative. The actions of the few Governors have not in any way impaired the Nation's ability to rely on the National Guard. In time of emergency or war, the President and Congress have respective authorities to call or mobilize part or all of the Guard into Federal service without the consent or concurrence of the Governors. Therefore, reliance on the Guard for National Defense has not been effected.

Readiness has not been effected. The actions of Governor Brennan of Maine to prohibit 48 of his soldiers from training in Honduras this year has not had, and will not have, an adverse impact on combat readiness just as California Governor Deukmejian's historic decision last year to prohibit 18 tanks and 450 California Guard personnel from training in Honduras had no impact on that units readiness. Governor Deukmejian's decision marked the first time in history that a Governor prevented his troops from *training* in a foreign country.

In spite of these decisions, the unit's readiness was not adversely impacted and the Guard was able to accomplish the assigned mission by using units from other

states. The fact that although these two Governors did prevent these two units from training in Honduras, they permitted deployments world-wide to include other countries in Central America as requested by National Guard Bureau.

The thesis that a unit that does not train in Honduras is adversely impacted in readiness terms is subjective at best and without basis in fact. If it were true, one would be forced to conclude that the majority, 80% or more, of units Active, Guard and Reserve, Army, Navy, Air Force and Marines are less ready and have been adversely impacted because they have not trained in Honduras.

Article 1, Section 8 of the Constitution reserves "to the States the Authority of training the militia (Guard) to a discipline prescribed by Congress. The word discipline as defined in legal and legislative discussions of this clause simply means a standard, level or bench mark; it has never been defined as including control, direction or approval/disapproval authority. An example of a proper "discipline prescribed by Congress" is the fifteen-day annual training period for Guardmembers contained in 32 U.S.C. Section 502. However, such annual training is carried out under the authority of the Governor who is constitutionally charged with training Guardmembers. It is quite clear from the wording that the *authority*, and therefore the right to approve and concur in training, is a fundamental state right. Had the framers of the Constitution wanted the Federal Government to have the authority over the militia (Guard) they would have said that.

Currently, the relevant statutes require the Governor's *consent* for the order to active duty of National

Guard members for overseas training. The current law is consistent with the Constitution since it recognizes the Governor's authority over National Guard Training. However, the proposed bill would eliminate any requirement to obtain a Governor's consent for such overseas training and would thereby strip the Governor of his authority over training. The proposed bill is therefore unconstitutional.

The National Guard Bureau maintains that any attempt to change the peacetime control of the Guard is a Constitution issue and would require a Constitutional amendment not simply legislative. Any, even if a legislative remedy were legal, we maintain that the pursuit of such legislation at this time is an overreaction to an operationally insignificant but perhaps politically very embarrassing incident.

Since this is a Constitutional issue, a legislative initiative to remove the Governor from peacetime control of overseas training of his National Guard is not appropriate. Furthermore, no initiative is warranted based on the facts.

I do not need new laws to accomplish my duties with the States, just your continuing support. Existing legislation empowers me to distribute resources, issue equipment and authorize and federally recognize units and individuals of the Army and Air National Guard.

MEMORANDUM ON THE CONSTITUTIONAL ISSUES RAISED BY PROPOSED LEGISLATION WHICH WOULD REMOVE THE AUTHORITY OF GOVERNOR WITH RE- SPECT TO OVERSEAS TRAINING OF THE NATIONAL GUARD

Legislation has been proposed to change several sections of the United States Code pertaining to the National Guard. The purpose of this memorandum is to address any legal issues raised by the proposed changes.

The sections of the U.S. Code proposed to be changed are 10 U.S.C. § 672(b), 10 U.S.C. § 672(d), and 32 U.S.C. § 501. The proposed bill is set forth at enclosure 1 hereto. The current law and proposed law are set forth side-by-side for comparison at enclosure 2 for 10 U.S.C. § 672 and at enclosure 3 for 32 U.S.C. § 501.

Currently, 32 U.S.C. § 501(b) provides that "[t]he training of the National Guard shall be conducted by the several States and Territories, Puerto Rico . . . , and the District of Columbia in conformity with this title."¹ Accordingly, under present law, the Governors of the respective states conduct and supervise National Guard training through their respective Adjutants General.²

¹ Hereinafter the several States and Territories, Puerto Rico . . . , and the District of Columbia will be referred to as "states".

² 32 U.S.C. § 314 provides Adjutants General of each state who shall perform the duties prescribed by the laws of that jurisdiction, and shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may

(Continued on following page)

Under the proposed legislation, an exception would purportedly be made to the states' authority over training the National Guard. The exception would allow the order to active duty of Guard units or members by the Secretaries of the Army and Air Force or their designees *for training* outside the United States, its territories and possessions *without* the necessity for the consent of or coordination with the Governors of the several states.

The central legal issue is whether this proposed legislation is unconstitutional. If it is, it would not be proper to go forward with the proposed legislation. If it is not unconstitutional, then it is proper for Congress to decide whether it is prudent to proceed with the proposed legislation, to take other action, or to take no action at all to change the law.

I. RELEVANT CONSTITUTIONAL PROVISIONS

The U.S. Constitution contains a number of important provisions dealing with the matters that pertain to the issue raised by the proposed legislation.

The Constitution specifically authorizes Congress

"To raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years;" ³

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prescribe. In practice, the State Adjutants General are in charge of the day to day operations of the National Guard.

³ Art. I, § 8, cl. 12

It also empowers Congress

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;" ⁴

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia* according to the discipline prescribed by Congress;" ⁵ (Emphasis supplied).

The first clause is commonly known as the "Army clause" and the last two are collectively known as the "Militia clause".

The President is also granted substantial power by the Constitution:

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;" ⁶

The major issue to be resolved is how the above clauses of the Constitution should be interpreted in the specific matter at hand, namely the proposed legislation which would remove any authority of the state and its Governor over overseas training of National Guard units or members.

⁴ Art. I, § 8, cl. 15

⁵ Art. I, § 8, cl. 16

⁶ Article II, § 2, cl. 1

It is clear and is not contested that the Federal Government has very substantial and broad authority over the National Guard (militia), but that authority is not unlimited. While the congress has broad authority to raise and support Armies and the President has broad authority as commander in Chief, the Constitution clearly reserves to the States two specific matters, that is "the Appointment of the Officers, and the Authority of training the militia." These reserved powers to the states are to be exercised "according to the discipline prescribed by Congress."

To properly interpret the above provisions, an in-depth analysis is required.

II. NATURE OF THE NATIONAL GUARD

The National Guard, as a matter of constitutional law,⁷ is a State military organization subject to Federal

⁷ Article I, § 8, clauses 15 and 16 of the Constitution are set forth *supra*. Article I, Section 10 of the Constitution provides, in relevant part:

No state shall, without the Consent of Congress, keep Troops, or Ships of War in time of Peace.

See also the Second Amendment to the Constitution which provides:

A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

The purpose of the Second Amendment is "to preserve the effectiveness and assure the continuation of the state militia." *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), cert

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regulation that is unique in kind and extent. The framers of the Constitution viewed the Militia as a military force available to the Federal Government for Federal purposes (indeed, for much of our history it was the only significant military force in being available to the Federal Government). They also recognized that it comprised, at the time, the standing armies of several sovereign States which had no intention of entirely surrendering their military capability to an untested central government. They accordingly left the Militia to the States but subjected it as a condition of national union, to Federal controls sufficient to insure its utility as a Federal military force. Thus, from the very beginning of our history as a nation, the Federal and State interests in the Militia have been inseparably intertwined.

The National Guard is, of course, the "modern Militia reserved to the States by . . . the Constitution." *Maryland v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159 (1965). Under its constitutional mandate, the National Guard has a dual Federal-state identity: in its Federal capacity, it is a component of the United States Army or Air Force,⁸ and in its state capacity, it is

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denied, 435 U.S. 926 (1977); see also *United States v. Miller*, 307 U.S. 174, 178 (1939) wherein the Supreme Court has referred to the Second Amendment as guaranteeing the right of the states to maintain and train militias.

⁸ 10 U.S.C. § 261(a) provides:

The reserve components of the armed forces are:

(1) The Army National Guard of the United States . . .

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the organized state militia. See *New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 278-79 (3d Cir., 1982), cert.

(Continued from previous page)

(5) The Air National Guard of the United States . . .

10 U.S.C. § 3078 provides that "The Army National Guard while in the service of the United States is a component of the Army." See generally 10 U.S.C. §§ 3495-3502.

10 U.S.C. § 8078 provides that "The Air National Guard of the United States while in the service of the United States is a component of the Air Force." See generally 10 U.S.C. §§ 8495-8502.

10 U.S.C. § 3062(c) provides:

The Army consists of -

- (1) the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve

10 U.S.C. § 8062(d) provides:

The Air Force consists of -

- (1) the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve

10 U.S.C. § 3077 provides:

The Army National Guard of the United States is the reserve component of the Army that consists of -

- (1) federally recognized units and organizations of the Army National Guard; and
- (2) members of the Army National Guard who are also Reserves of the Army.

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denied, 459 U.S. 988 (1982). In its federal capacity, the purpose of the National Guard is to augment the regular forces when ordered into federal service in time of war or national emergency⁹ and to carry out those purposes in Article I, § 8, cl. 15 (*supra*) when called into Federal service. In its state capacity, the Governor may direct the National Guard to perform missions and activities in support of the state. See 32 U.S.C. § 109(b).

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10 U.S.C. § 8077 provides:

The Air National Guard of the United States is the reserve component of the Air Force that consists of -

- (1) federally recognized units and organizations of the Air National Guard; and
- (2) members of the Air National Guard who are also Reserves of the Air Force.

10 U.S.C. § 311 provides:

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.

(b) The classes of the militia are -

- (1) the organized militia, which consists of the National Guard and the Naval Militia; and
- (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

⁹ 32 U.S.C. § 102 and 10 U.S.C. § 262

While the conceptual positioning of the National Guard has not changed since 1789, the actual Federal involvement in the control of National Guard affairs has increased as the importance of the National Guard in national defense planning has increased. From the days of the Minutemen of Lexington and Concord until just before World War I, the various state militias, while embodying the concept of a citizen army, lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States armed forces. *Maryland v. United States*, 381 U.S. at 46. The National Defense Act of 1916 materially altered the status of the militias by constituting them as the National Guard. With the passage of the National Defense Act of 1916, "the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards." *Id.* at 46, 47. By this Act, Congress established the standards for the organization, training and discipline of the Guard, including, for the first time, standards for the appointment and retention of its personnel.¹⁰ Congress, in return, "authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments." *Id.* at 47.

In spite of congressional "reorganization" of the militia into the National Guard, the state governors remain in charge of their state's National Guard, except when it is called or ordered into active Federal service. *Maryland v. United States*, 381 U.S. at 47. In most, if not all, instances

¹⁰ See generally H.R. Rep. No. 297, 64th Cong., 1st Sess. 1-15 (1916); 53 Cong. Rec. 4312-17 (March 17, 1916).

the Governors administer the Guard through State Adjutants General, who are required to report periodically to the National Guard Bureau, a Federal organization,¹¹ on the Guards' reserve status. *Id.* Thus, except when called or ordered into active Federal service, the states exercise control over their respective militias, circumscribed only by the "discipline prescribed by Congress," U.S. Const., Art. I, Sec 8, Cl. 16, which is implemented by federal regulations promulgated by the Secretaries of the Army and of the Air Force. The concept of state control of the National Guard has been summarized as:

It is almost too plain for argument, that the power . . . given to Congress over the militia, is of a limited nature, and confined to the objects specified in [the Constitution]; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities.

Houston v. Moore, 18 U.S. (5 Wheat) 1, 50 (1820) (Opinion of Story, J.). See also 10 U.S.C. § 3079 and § 8079 which provides that, when not on active duty, members of the

¹¹ The National Guard Bureau's statutory mandate is 10 U.S.C. § 3015 which provides, in relevant part:

(1) There is a National Guard Bureau of the Department of the Army and the Department of the Air Force, headed by a Chief who is the adviser to the Army Chief of Staff and the Air Force Chief of Staff on National Guard matters. The National Guard Bureau is the channel of communication between the departments concerned and the several States, Puerto Rico, the Canal zone, and the District of Columbia on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States.

Army and Air National Guard of the United States shall be administered, armed, equipped and trained in their status as members of the Army or Air National Guard (that is, under state control).

In the post-World War II period the Federal Government has undertaken virtually the entire responsibility for funding and equipping the National Guard and prescribing its organization and training. To this end, a large body of Federal regulations directive upon the states, has grown up together with a joint Bureau, within the Departments of Army and Air Force (the National Guard Bureau) to administer and enforce them. Failure of a state to abide by federal regulations could result in a loss of federal support for its National Guard. 32 U.S.C. § 108.

As the Supreme Court has recognized, the Guard has been organized so that it is "capable of being assimilated with ease into the regular military establishment of the United States." *Maryland v. United States*, 381 U.S. at 46. It provides the federal government with operationally ready combat units, combat support units, and qualified personnel for active duty to support augmentation requirements to fulfill Army and Air Force war and emergency contingency commitments, and to perform such peacetime missions as are compatible with training requirements and the maintenance of mobilization readiness. This vital federal role is evidenced by Congress' statutory determination that "it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line of defense of the United States be maintained and assured at all times." 32 U.S.C. 102.

III. CURRENT STATUTORY AUTHORITIES FOR CALLING OR ORDERING THE NATIONAL GUARD IN FEDERAL SERVICE.

There are a number of authorities for calling or ordering the National Guard into federal service. A list of these authorities is included as enclosure 4 to this memorandum. The National Guard may be involuntarily called into federal service to provide federal aid for state governments when necessary to suppress insurrection in any state against its government¹²; when unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States cannot be enforced through normal means¹³; when there is interference with state and federal law¹⁴; and when there is invasion or danger of invasion by a foreign nation, there is a rebellion or danger of a rebellion against the authority of the United States, or the President is unable with the regular forces to execute the laws of the United States.¹⁵

National Guard units or members may be involuntarily ordered to active duty when there is declaration of war or national emergency declared by Congress¹⁶; there is a national emergency declared by the President (limited to 1 million members and 24 months in duration)¹⁷; and there is a need for the President to augment active

¹² 10 U.S.C. § 331

¹³ 10 U.S.C. § 332

¹⁴ 10 U.S.C. § 333

¹⁵ 10 U.S.C. § 3500 and § 8500

¹⁶ 10 U.S.C. § 672(a)

¹⁷ 10 U.S.C. § 673(a)

forces for an operational mission (limited to 100,000 members and 90 days in duration).¹⁸

There are two other sections that may be used to order National Guard units or members into federal service, namely 10 U.S.C. § 672(b) and 10 U.S.C. § 672(d). Unlike the other statutory authorities noted above, 10 U.S.C. §§ 672(b) and (d) do not require any conditions precedent (i.e., war, national emergency, augment operational mission, insurgency, rebellion, invasion) for their use. These authorities may be used at any time; provided however, in the case of National Guard members, the Governor *consents* to the order under either section. Also, the consent of the individual service member is required under 10 U.S.C. § 672(d). While use of § 672(b) is limited to not more than 15 days per year, there is no duration limit for use of § 672(d). These two sections are set forth at enclosure 2. The proposed legislation would eliminate the requirement under both sections for the Governors' consent for overseas training of Guard units or members.

In the case of the National Guard, the provisions of 10 U.S.C. § 672(b) and 10 U.S.C. § 672(d) have traditionally been used in peacetime situations where it is necessary to place National Guard units or members on federal active duty for some purpose, such as overseas deployment training.

¹⁸ 10 U.S.C. § 673b

IV. OVERSEAS DEPLOYMENT TRAINING

While not required by statute, National Guard members are currently required to participate in overseas deployment training in a federal active duty status by Army and National Guard regulations.¹⁹ Units or individuals are ordered to active duty under 10 U.S.C. § 672(b) or 10 U.S.C. § 672(d) for such overseas training, assuming the Governor of the state consents.

Under current law, training within the United States of National Guard members is ordinarily conducted pursuant to one of the various sections of title 32 of the United States Code under the authority of the Governor.

If it is required for some reason that training be conducted in a federal status under title 10 of the United States Code, the Governor has initial authority over such training since he must consent for a Guard member or unit of his state to train in a federal status under 10 U.S.C. § 672(b) or 10 U.S.C. § 672(d). Once the Governor consents and the individual or unit is ordered to active duty, the individual or unit is subject only to federal authorities for the period of training. 32 U.S.C. § 325(a).

Under the proposed legislation, the need for the Governor's consent would be removed for training to be conducted outside the United States, its territories, and possessions. Accordingly, the Governor's authority over such training would be abrogated.

¹⁹ Army Regulation 350-9 and National Guard Regulation 310-1

V. CONSTITUTIONAL ISSUES

The central legal issue that must now be addressed is whether the proposed legislation is unconstitutional. The proposed legislation, included as enclosure 1 hereto, would remove any authority of the state and its Governor pertaining to overseas training of National Guard units or members. This purported change in the law would occur by modifying 32 U.S.C. § 501, 10 U.S.C. § 672(b), and 10 U.S.C. § 672(d). The current law and proposed law are set forth for comparison at enclosures 2 and 3.

A. MILITIA CLAUSE

The Militia clause²⁰ clearly reserves "to the States respectively, the Appointment of Officers, and the *Authority of training the Militia* according to the discipline prescribed by Congress." However, the question has been raised as to whether the Militia clause, as it pertains to the authority of training, is still applicable today to the Army and Air National Guard²¹ as well as to the Army

²⁰ Article I, § 8, cl. 16 which is set forth in full *supra*.

²¹ 10 U.S.C. § 101(10) and 32 U.S.C. § 101(4) provide:

"Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that -

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

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and Air National Guard of the United States.²²

The Militia clause is still alive and well. Notwithstanding various reorganizations over the history of this nation, the militia remains in place as was intended by the framers of the U.S. Constitution. The U.S. Supreme Court has clearly recognized that the militia reserved to the states by the Constitution is the National Guard of

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(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

10 U.S.C. § 101(12) and 32 U.S.C. § 101(6) provide:

"Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that -

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

²² 10 U.S.C. § 101(11) and 32 U.S.C. § 101(5) provide:

"Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

10 U.S.C. § 101(13) and 32 U.S.C. § 101(7) provide:

"Air National Guard of the United States" means the reserve component of the Air Force all of whose members are members of the Air National Guard.

Also, see 10 U.S.C. § 3077 and 10 U.S.C. § 8077 concerning the Army and Air National Guard of the United States quoted in footnote 8 *supra*.

today. *Maryland v. United States*, 381 U.S. at 46. The term National Guard "means the Army National Guard and the Air National Guard."²³ Congress has recognized that the National Guard is the militia referred to in the Militia clause of the Constitution by expressly providing that the "Army and Air National Guard" means that part of the organized militia of the several states that is *trained* and has its officers appointed, under Article I, § 8, cl. 16.²⁴

The National Guard of the United States was created by Congress in 1933, Act of June 15, 1933, ch. 87, 48 Stat. 153. The purpose of the 1933 Act was to authorize the federal government to order the National Guard into federal service for purposes other than those stated in Article I, § 8, cl. 15, for calling forth the militia (National Guard), "namely to execute the Laws of the Union, suppress Insurrections and repel Invasions." Before this Act, members of the National Guard were drafted into the Federal service as individual citizens without regard to membership or rank in the National Guard for purposes other than stated in Article I, § 8, cl. 15. In concluding that there was no "constitutional or legal objection" to the creation of this organization, Congress envisioned its use only in the event of war or other emergency declared by Congress:

"Congress had the power under the Army provisions of the Constitution to amend the National Defense Act so as to set up a reserve organization as a part of the Army of the United

²³ 10 U.S.C. § 101(9) and 32 U.S.C. § 101(3).

²⁴ 10 U.S.C. §§ 101(10) and (12); and 32 U.S.C. §§ 101(4) and (6) which are quoted in footnote 21 *supra*.

States, which should comprise the officers and men of the National Guard of the States, Territories and District of Columbia, and to so provide that the organization of such reserve would in no manner affect the administration, officering, training, and control of the National Guard as State forces in time of peace; but that such reserve organization of the Army of the United States would function as such only in the event of war or other emergency declared by Congress."

H.R. Rep. No. 141, 73d Cong., 1st Sess. 3 (1933).

The Army and Air National Guard of the United States are also subject to the Militia clause. The Army and Air National Guard of the United States consists of federally recognized units and organizations of the Army and Air National Guard, and of members of the Army and Air National Guard who are also Reserves of the Army or Air Force. All members of the Army or Air National Guard of the United States must first be members of the Army or Air National Guard of a state.²⁵ Thus, these two organizations are composed of the same federally recognized units and the same federally recognized people. Accordingly, a soldier's status as a member of the Army or Air National Guard of the United States and his/her simultaneous status as a member of the Army or Air National Guard of a state are inseparably intertwined. As the authority of training is expressly reserved to the states by the Militia clause,²⁶ the states' authority over training

²⁵ See footnotes 8 and 22 *supra*.

²⁶ In *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 36-37, Justice Johnson of the U.S. Supreme Court recognized that Congress'

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extends to the training of Guard members and units in either status. Otherwise, the federal government would have the unrestrained power to conduct all training in a federal active duty status and take away a state's organized militia.

While the states retain the authority of training, such training is to be conducted "according to the discipline prescribed by Congress". The "discipline prescribed by Congress" has been applied through various statutes passed by Congress and enacted in law. The training standards contained in title 32 of the United States Code reflect the most pertinent examples. It is provided in 32 U.S.C. § 501(a) that the discipline, including training, of the Army and Air National Guard shall conform to that of the Army and the Air Force. However, consistent with the Militia clause, Congress placed the authority to conduct training with the states.²⁷ A good example of a proper "discipline prescribed by Congress" is the requirement for 48 drills per year and 15 days of annual training

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power over the militia (National Guard) was limited by the two reservations in favor of the states in the Militia clause, namely the right of officering and that of *training* the militia. Furthermore, he stated:

Indeed, extensive as [Congress'] power over the militia is, the United States [is] obviously intended to be made dependant upon the States for this . . . force. For, if the States will not officer or train the men, there is no power given to Congress to supply the deficiency. *Id.* at 37.

²⁷ 32 U.S.C. 501(b).

for units and members of the Army and Air National Guard.²⁸

In researching the Constitutional question at issue, the legislative history of various important legislation affecting the National Guard was examined. This legislation included the Militia Act of 1792,²⁹ the Dick Act,³⁰ the National Defense Act of 1916,³¹ the National Defense Act Amendments of 1933,³² and the Armed Forces Reserve Act of 1952.³³ It should be noted, however, that such legislative history is not determinative on issues of Constitutional law and interpretation. On the other hand, the authority of the states over training of Guard units and members was clearly recognized in the legislative history.

B. THE ARMY CLAUSE

An issue arises as to whether the Army clause (the power to raise and support armies)³⁴ overrides the Militia

²⁸ 32 U.S.C. 502. Also see *Greenwood v. Department of Military Affairs*, 78 Pa. Commw. 480, 468 A. 2d 866 (1983):

One element of the "discipline prescribed by Congress" is the fifteen-day annual encampment of all guardsmen for maneuvers, target practice and field exercises funded by the federal government. *Id.* at 870.

²⁹ Act of May 8, 1792, ch. 33, 1 Stat. 271

³⁰ Act of Jan. 21, 1903, 32 Stat. 775

³¹ Act of June 3, 1916, ch. 134, 39 Stat. 166

³² Act of June 15, 1933, ch. 87, 48 Stat. 153

³³ Act of July 9, 1952, 66 Stat. 481

³⁴ Article I, § 8, cl. 12; The War clause (Article I, § 8, cl. 11) is not addressed since it is not deemed applicable to overseas training in peacetime which is at issue here.

clause³⁵ in the case of the proposed legislation which would abrogate the Governor's authority pertaining to overseas training of guard units and members. Based on a review of the relevant case law concerning the relationship between the Army clause and the Militia clause, it is concluded that the Army clause would not nullify the Militia clause as it pertains to the states' authority over training, including overseas training. No cases were found that specifically address this issue.

The U.S. Supreme Court has addressed the relationship between the Army clause and the Militia clause in several cases, including *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox v. Wood*, 247 U.S. 3 (1918).

In *Selective Draft Law Cases*, the constitutionality of a selective draft law was at issue at a time of war (World War I). The Army clause was held to override any objections to the law based on the Militia clause.

The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant.
Id. at 383

However, this case has no bearing on the Militia clause as it pertains to peacetime training of the National Guard. The states' reserved powers under the militia clause pertaining to the appointment of officers and the authority of training the National Guard were not at issue.

³⁵ Article I, § 8, cl. 15 and 16

The Solicitor General arguing on behalf of the compulsory draft law stated that the law did not affect the right of the states to organize and *train* the militia:

The present law draws into the National Army but a small portion of the militia as a whole, and the withdrawal from possible call for local service is only temporary. . . .

The right of the States to organize and train the militia remaining has been recognized and safeguarded. *Id.* at 372.

The other Supreme Court case, also decided during World War I, is *Cox v. Wood*, 247 U.S. 3 (1918), which concerned a service member's assertion that under the Militia clause he was entitled to "constitutional immunity from military service beyond the territorial limits of the United States." 247 U.S. at 4. The service member argued that the authority of Congress was limited by Article I, § 8, cl. 15 to calling forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions", and that Congress could not require service abroad. The court held that this part of the Militia clause (Article I, § 8, cl. 15) did not restrict such service abroad in view of Congress' power under the War clause and the Army clause. This case does not, however, address peacetime training of National Guard units and members, or the states' reserved right to conduct such training which is set forth in a different clause, Article I, § 8, cl. 16.

C. INTERPRETATION OF THE CONSTITUTION PROVISIONS

Concerning the proposed legislation, there is no compelling need or reason to interpret the Army clause and

the Militia clause as being inconsistent. This is not a wartime or national emergency situation as existed when the above referenced U.S. Supreme Court cases were decided. The issue to be resolved is peacetime training of the National Guard which is specifically and plainly reserved to the states by Article I, § 8, cl. 16 of the Constitution.

The U.S. Supreme Court has long held that no clause in the Constitution is intended to be without effect and that Congress may not alter the Constitution by ordinary legislative act.³⁶ Subsequently, this holding was expanded by the Supreme Court when it held that "[t]he Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity."³⁷ Also, the Supreme Court held that when "fundamental principles [of the Constitution] are of equal dignity, neither must be so enforced as to nullify or substantially impair the other."³⁸

Congress in carrying out its legislative responsibility must not give precedence to the "Army" clause over the "militia" clause. It must construe the clauses in a manner to make both clauses operative. It may not interpret the "Army" clause to nullify or impair the clear intent of the "Militia" clause as to training of Guard unit and members.

³⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 173 (1803)

³⁷ *Prout v. Starr*, 188 U.S. 537, 543 (1903)

³⁸ *Dick v. United States*, 208 U.S. 340, 353 (1908)

As the Militia clause of the Constitution clearly and expressly places the authority of training the National Guard with the states, the proposed legislation is unconstitutional to the extent that it removes the requirement for the Governor's consent for overseas training.

D. CONCLUSION

Earlier in this memorandum the current statutory authorities for calling or ordering the National Guard into federal service were discussed. The various authorities for involuntarily calling the National Guard into federal service³⁹ are consistent with the purposes set forth in Article I, § 8, cl. 15. The current authorities for involuntarily ordering the National Guard into Federal service⁴⁰ are lawful under Congress' authority under the War clause and the Army clause. Under these sections, National Guard units or members may be involuntarily ordered to active duty because of war, national emergency, or to augment active forces for an operational mission.

However, the proposed legislation goes beyond the limits of the War clause and the Army clause. It would extend to the peacetime training of the National Guard which is Constitutionally reserved to the states by the Militia clause. Accordingly, the proposed legislation would be unconstitutional if enacted into law.

³⁹ 10 U.S.C. § 331, 10 U.S.C. § 332, 10 U.S.C. § 333, and 10 U.S.C. § 3500 and § 8500.

⁴⁰ 10 U.S.C. § 672(a), 10 U.S.C. § 673(a), and 10 U.S.C. § 673b.

Congress does have the power, however, to pass legislation for overseas deployments to augment active forces for operational missions, such as 10 U.S.C. § 673(b). Currently, the President under this section of the U.S. Code can order up to 100,000 Reservists to active duty for a period of 90 days in duration to augment the active forces for any operational mission. Such an order for an operational mission would not be restricted by the Militia clause since it would not be for training.

In summary, the major Constitutional flaw with this legislation is that it would abrogate the reserved right of the states to train their National Guards.

Prepared by:
Office of Legal Advisor
National Guard Bureau
July 1986

TO RECEIVE TESTIMONY ON FEDERAL AUTHORITY OVER NATIONAL GUARD TRAINING

TUESDAY, JULY 15, 1986

United States Senate
Committee on Armed Services
Subcommittee on Manpower &
Personnel
Washington, D. C.

The Subcommittee met, pursuant to notice, at 9:06 a.m., in Room SR-232A, Russell Senate Office Building, The Honorable Pete Wilson (Chairman of the Subcommittee), presiding.

Members Present: Senators Barry Goldwater, Pete Wilson, Jeremiah Denton, Phil Gramm, James T. Broyhill, John C. Stennis, J. James Exon, Carl Levin and John Glenn.

Committee Staff Members Present: Arnold L. Punaro, Staff Director for the Minority; Patrick A. Tucker, General Counsel; and Jeffrey H. Smith, Minority Counsel.

Professional Staff Members Present: Robert E. Bayer, Robert G. Bell, David S. Lyles and Patricia L. Watson.

Staff Assistant Present: Marie F. Dickinson.

Committee Members' Assistants Present: Romie L. Brownlee, Assistant to Senator Warner; Mark J. Albrecht, Assistant to Senator Wilson; Allan W. Cameron, Assistant to Senator Denton; Alan Ptak, Assistant to Senator Gramm; Francis J. Sullivan, Assistant to Senator Stennis; Janne E. Nolan, Assistant to Senator Hart; Jeffrey B. Subko, Assistant to Senator Exon; John B. Keeley, Assistant to Senator Levin; Thomas K. Longsteth, Assistant to Senator

Kennedy; Charles C. Smith, Assistant to Senator Dixon; and Phillip P. Upschulte, Assistant to Senator Glenn.

Senator Wilson: Good morning, ladies and gentlemen.

This hearing will come to order.

The Subcommittee meets this morning with all members of the full Committee invited to attend to consider the question of whether it is now appropriate to change the Federal policy which permits governors of the several states to prevent the training of members of the units of the Army and Air National Guard of the United States.

There should be no question about why this hearing is being held. It is being held because the governors of several states have either denied consent or have said they would deny consent for members of the National Guard from their states to participate in training in Central America or in selected countries in Central America.

The Governor of Maine denied consent for a 35-member Army National Guard Engineering Detachment and a 13-member Army National Guard Public Affairs unit to participate in training

Let me state, sir, that the DOD's position, and I quote from Secretary Webb's memo to me, dated 6 May, 1986, one paragraph:

"I must advise you that it is the official position of the Department of Defense to say there is no constitutional inhibition against the enactment of legislation that would alter the requirement of 10 U. S. Code, section 672,

that a governor consent to training that takes place outside the continental U. S. Such legislation would be permissible under the Army clause, Article 1, Section (a) of the Constitution which has governed the issue of the National Guard status as a Federal Reserve component."

Senator Levin: General Walker, do you oppose this legislation as being unnecessary?

Is that the bottom line, your personal opinion is in opposition?

General Walker: Sir, that is exactly the way I feel about it. I do not think we need it. I have no necessity for it to do my job. I just think it is something you are tinkering with that has served us well for years and years and years and that is state control.

Senator Levin: Did your first statement make your personal position clearer, first draft, than the draft you delivered this morning?

General Walker: Yes, sir.

FEB 8 1890

JOSEPH F. SPANIOLO, JR.
CLERK

No. 89-542

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

RUDY PERPICH, as Governor of the
State of Minnesota, and THE STATE
OF MINNESOTA, by its Attorney
General Hubert H. Humphrey, III,

Petitioners,

v.

UNITED STATES DEPARTMENT
OF DEFENSE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF IOWA,
MAINE, MASSACHUSETTS, MONTANA OHIO AND
VERMONT IN SUPPORT OF PETITIONERS

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ISSUE PRESENTED

Given the provision in U.S. Const. art. I, § 8, cl. 16 "reserving to the States respectively . . . the Authority of training the Militia . . ." (emphasis added), may Congress authorize the federal executive branch to call the militia into active duty solely for training, without regard to a state's objection to the purpose, type, schedule or location of the training?

INTEREST OF THE AMICI CURIAE

The states identified above submit this brief amici curiae to urge the Court to hold that Congress may not, by enacting 10 U.S.C. § 672(f)(1988), withdraw authority from the states over the location, purpose, type or schedule of training the militia -- i.e. the National Guard. The amici are sovereign states that possess the authority over "training the [m]ilitia" that is

"reserv[ed] to the States" under the Federal Constitution. U.S. Const. art. I, § 8, cl. 16 ("the Militia Training Clause").^{1/} The changes effected by 10 U.S.C. § 672(f) alter the balance of state and federal control over 54 national guards in all fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam and the Virgin Islands.

The interest of the amici transcends any dispute over the location, purpose, type or schedule of particular National Guard training exercises. The amici seek to preserve the constitutional balance between the powers of the

^{1/} "The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16 of the Constitution." Maryland, for the use of Levin v. United States, 381 U.S. 41, 46, vacated and modified on other grounds, 382 U.S. 159 (1965) (emphasis added).

Federal Government and those of the states, as established by the framers of the Constitution. They seek to preserve the states' autonomy and their identities as independent repositories of sovereign authority within our federal system.

In particular, the amici view this case as an important test of the vitality of their reserved powers under the Militia Training Clause. A definitive affirmation of those powers in this case would preserve the constitutional balance of power between the states and the Federal Government and provide guidance to states who wish to exercise their powers in accordance with the framers' intent. This intent is already plainly expressed in the words of the Constitution, and has been subsequently reaffirmed by the courts

and respected by Congress until enactment of the legislation at issue in this litigation. See A-14 to 62 (Heaney, S.C.J. et al., dissenting).

STATEMENT OF THE CASE

The facts of this case involve solely the training of Minnesota National Guard members overseas. The amici rely upon Minnesota's statement of the case.

SUMMARY OF THE ARGUMENT

1. The historical purposes of the Militia Training Clause have been to allow the states to serve as checks and balances upon the federal use of the militia, and to preserve the democratic principles inherent in the concept of a militia, which consists of citizen-soldiers, in contrast to a federal army (pp. 8-16). Until 1986, Congress respected the states' authority

over training the National Guard in the absence of war or national emergency (pp. 28-33).

2. The federal orders in this case are expressly for the purpose of training the Minnesota National Guard. The National Guard is the modern militia reserved to the states. (p. 2, n.1). Accordingly, the orders violate principles of federalism and the express language of the Constitution "reserving to the States respectively . . . the Authority of training the Militia" (pp. 17-18).

3. The United States may not justify federal training of the National Guard by relying on the fact that National Guard members must also enlist in the National Guard of the United States (pp. 34-36). The federal government cannot train the militia

under the Armies Clause, U.S. Const., art. I, § 8, cl. 12, for to do so would destroy the contrast between the militia and the army in the face of the express reservation of militia training to the states (pp. 36-41). This would violate rules of constitutional construction and common sense by allowing a general clause to violate and vitiate the more specific Militia Training Clause (pp. 38-40). Nor can the United States claim that the National Guard of the United States is something other than militia (pp. 41-48).

4. Title 10 U.S.C. § 672(f), the "Montgomery Amendment," does not fall within Congress' power to prescribe discipline for training conducted by the states (pp. 48-51). It prescribes that training be done by the federal

government, not the states (p. 49). In fact, it does not prescribe any discipline, but simply purports to withdraw power from the states (p. 50).

5. Policy concerns expressed by the District Court and the United States are exaggerated and irrelevant (pp. 51-56). The federal government has ample authority to use the National Guard for operational missions, as opposed to training (pp. 53-54).

6. Even if the Court does not invalidate 10 U.S.C. § 672(f), it should construe the statute so as to avoid serious constitutional doubts (pp. 56-59). The statute therefore must be construed as continuing the requirement that, if the federal government wishes to train the militia, it must declare a national exigency (pp. 59-62).

ARGUMENT

The decision below renders meaningless the Militia Training Clause's express limitation on federal legislative power over training the militia. The Eighth Circuit's reasoning allows Congress to usurp the powers reserved to the States under that clause simply by claiming to act under the Armies Clause and passing legislation in the ordinary course. See A-5 to 13. The Armies Clause does not authorize such an easy evasion of the express limitations upon Congress' authority over militia training.

A. The Militia Clause Preserves Our System of Federalism.

The militia is a hybrid organization, subject to both state and federal control. United States v.

Miller, 307 U.S. 174, 178-179 (1939). The Militia Clause itself created this hybrid, by balancing federal wartime control over the militia with state authority over, among other things, militia training. The Clause is a significant part of the checks and balances of the Federal Constitution.

"The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a 'counterpoise' to the power of the Federal Government. See e.g. The Federalist No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961)." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238-239, n.2 (1985). The states' role as "counterpoise" is not a mere formality, as the Montgomery

Amendment would suggest, but furthers basic Constitutional goals.^{2/}

The balance of federal and state powers struck by the Militia Clause serves the fundamental purpose of preserving democratic principles. In the words of the framers, state control over militia training promotes responsiveness to "the local genius of the people" which the federal government could not accommodate adequately.^{3/} Like other provisions of the Constitution, the Militia Clause reflects the "due regard for the presuppositions of our embracing

^{2/} "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." Id. (emphasis added).

^{3/} The Records of the Federal Convention of 1787, Vol. II (Yale University Press, 1911) (Farrand, ed.), p. 331 (remarks of Delegate Ellsworth) (hereinafter "Farrand").

federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy. . . ." See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959) (emphasis added) (construing Supremacy Clause). See also City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 643 (1973) (Rhenquist, J., dissenting); Note, The Militia Clauses, The National Guard and Federalism: A Constitutional Tug of War, 57 Geo. Wash. L. Rev., 328, 349 (1989).

The states' control over the militia serves as a check upon the abuses of federal power feared by the framers. In response to the opponents of the proposed constitution, who feared the concentration of power in a national government and the destruction of state sovereignty, the Federalists relied upon

the state governments, as alternative sources of authority and objects of loyalty, to curb any tendency of the national government toward unresponsiveness, excessive centralization and tyranny. The Federalist No. 17, (A. Hamilton), No. 46 (J. Madison). There is no doubt that state control over the militia was an integral part of the framers' planned structure as a means of securing the blessings of liberty won in the war of independence: "[W]henever governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia in order to raise an army upon their ruins." H.R. Debates on Amendments to the Constitution (August 17, 1789) (remarks of Representative Gerry), reprinted in 1 Gales & Seaton, Debates and Proceedings in the Congress of the United States (1834). To avoid such abuses, the states were to retain "a preponderating

influence over the militia." The Federalist No. 29 (A. Hamilton) (Mentor ed.), p. 186.

Without state control, protected against Congressional abrogation, it is impossible to achieve the pro-democratic purposes of the Militia Training Clause. Cf. Miller, supra at 178-179. For the powers reposed in the central government to be effectively cabined, the states themselves must remain strong both to serve as effective checks upon the central government and to nurture the democratic spirit. To remain strong, the states must retain the confidence and affection of their citizens. This they cannot do except as they remain accountable, effective instruments of self-government.

Even without an express grant of reserved power to the states, this Court has invalidated federal legislation that infringes upon the states' implied powers. See Lane County v. Oregon, 74

U.S. (7 Wall.) 71 (1869) (state taxing power); Coyle v. Smith, 221 U.S. 559, 565 (1911) (Congress may not prescribe location of a state's capital); Hopkins Federal Savings & Loan Association v. Cleary, 296 U.S. 315 (1935) (conversion of quasi-public state savings and loan associations into federal associations contravenes the reserved powers of the states).

A law that treats a state inconsistently with its "constitutionally recognized independent status" is void "because it would be contrary to the structural assumptions and the tacit postulates of the Constitution as a whole." Tribe, American Constitutional Law, § 5-20, p. 379, and n.6 (2nd Ed. 1989). The various provisions of the Constitution are to be construed harmoniously with

the States' reserved powers. See Fry v. United States, 421 U.S. 542, 547, n.7 (1975).

Yet, the Eighth Circuit's holding -- that the militia may be federalized for purposes of training -- would impair the states' sovereignty by destroying the constitutional "contrast" between "the Militia which the States are expected to maintain and train" and the "troops which they were forbidden to keep without consent of Congress." See Miller, supra, 307 U.S. at 178-179 (emphasis added) (Interpreting the Second Amendment in light of the Militia Clause).^{4/} The intrusion into state sovereignty, attempted by Congress and

^{4/} See also Selective Draft Cases, 245 U.S. 366, 387 (1918) (referring to the National Guard as "the organized body of militia within the States, as trained by the States under the direction of Congress . . .").

upheld by the Eighth Circuit, should not be countenanced.^{5/}

B. The Text, Structure, History and Purpose of the Constitution Reflect Federalism By Reserving Authority Over the Training of the National Guard to the States.

The states' authority over militia training is confirmed by every conceivable source of constitutional interpretation: the text of the Militia Training Clause, the structure of the Constitution, basic principles of Constitutional interpretation, other

^{5/} In addition, the Eighth Circuit's holding that the federal government may train the militia vitiates the constitutional requirement that the President declare an exigency prior to assuming control over the militia. This requirement, though easily met if the President chooses to do so, serves the important purpose of informing the citizenry of the federal government's true purposes. In eliminating the requirement, 10 U.S.C. § 672(f) once again undermines democracy by reducing the accountability of the federal government to the people.

provisions of the Constitution (especially the Second Amendment), the Constitutional debates, Congressional understandings from 1787 through 1986, judicial decisions, as well as the general principles of federalism just discussed.

1. The Clear Text of the Constitution Protects the States' Powers over Militia Training from Federal Legislative Encroachment.

While most powers of the states are not enumerated expressly in the United States Constitution,^{6/} the Constitution could hardly be more explicit in setting forth the separate roles of the federal and state governments with respect to the militia. The language and structure of the Constitution unequivocally demonstrate that the states, not the federal government, possess the

^{6/} See Tribe, American Constitutional Law, supra, § 5-20, pp. 378-379.

power over militia training. See The Militia Clause, Geo. Wash. L. Rev., supra, at pp. 346-357.

The Constitution defines the states' authority over the militia, in part, in its express language "... reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia ..." U.S. Const., art. I, Section 8, Clause 16.^{7/}

The clear language of this clause simultaneously establishes a limitation on Congress and provides for the

^{7/} U.S. Const., art. I, § 8, clause 16 provides:

The Congress shall have power . . .

[16] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline Prescribed by Congress. . . .

exclusivity of the states' authority over training. See Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).^{8/}

By placing this language in Article I, which delineates Congress' powers, the Constitution expressly preserves the states' powers as against federal legislation. The only permissible federal legislation regarding training the militia would prescribe discipline,

^{8/} In upholding the Regents' order that University of California students complete a military science course, the Court stated:

"So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government, and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of the ends." Id. at 260, (emphasis added) citing, inter alia, the Second Amendment and Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16-17.

which is not involved here. See below, pp. 48-51. Congress therefore cannot exercise or legislatively alter the authority of training the National Guard.

Indeed, if the Congress can authorize a call into federal service for training, the Militia Training Clause becomes useless. Under the Federal Government's view, adopted by the Eighth Circuit, a simple majority vote of Congress can authorize the federal executive to exercise the authority of training the militia. The Constitution should not be interpreted as having any meaningless clauses. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

In short, the Militia Training Clause must, contrary to the ruling below, grant the states the authority of training the militia notwithstanding

federal legislative attempts to transfer that authority to the federal executive branch.

2. The History of the Militia Clause Demonstrates That the Purpose of the Clause is to Limit Federal Control over the Training of the Militia.

The debates over the Militia Clause reflected the delegates' concerns to preserve state authority in order to retain the responsiveness of the militia, as a citizen army, to the States and, thereby, to the will of the people.

These principles were articulated early in the debates over the Militia Clause:

[Delegate Ellsworth] The whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power. He thought the Genl Authority could not sufficiently pervade the Union for such a purpose, nor could it

accommodate itself to the local genius of the people. It must be vain to ask the States to give the Militia out of their hands.

Mr. Dickenson. We are come now to a most important matter, that of the sword. His opinion was that the States never would nor ought to give up all authority over the Militia. .

. .

2 Farrand, p. 331 (emphasis added).

When the Convention debated the clause as finally enacted, one delegate initially thought that the clause might merely restate the general principle that the states retain whatever power the federal government lacks:

Mr. Sherman moved to strike out the last member - "and authority of training &c.["] He thought it unnecessary. The States will have this authority of course if not given up. Id., p. 385.

This unsuccessful motion was based on the same logic as the Montgomery Amendment and the Eighth Circuit's opinion, but carried that logic to its

proper conclusion: if Delegate Sherman's interpretation were correct, then the Militia Training Clause was meaningless and should have been stricken.^{9/} Subsequent discussion

^{9/} The District Court in Dukakis v. U.S. Dept. of Defense, 686 F. Supp. 30, 38 (D. Mass), aff'd 859 F.2d 1066 (1st Cir. 1988) (per curiam), cert. denied, 109 S. Ct. 1743 (1989), also attempted to find some residual meaning in the Militia Training Clause by stating that the clause leaves the authority over the militia to the states when the federal government decides not to exercise that authority. This is tantamount to saying that the Militia Clause is surplusage (and, as such, meaningless). The notion that the states retain whatever governmental powers the federal government declines to exercise is already inherent in our Constitution, which establishes the federal government as a government of limited powers, leaving all other powers to the states and the people. The Federalist No. 39 (Madison) (Mentor ed.), p. 245 (The federal government "cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other

(footnote continued)

not only pointed out the error in Delegate Sherman's initial view of the purpose of the clause, but actually convinced Sherman himself:

Mr. Elsworth doubted the propriety of striking out the sentence. The reason assigned applies as well to the other reservation of the appointment to offices. He remarked at the same time that the term discipline was of vast extent and might be so expounded as to include all power on the subject.

Mr. King, by way of explanation, said that by organizing the Committee meant, proportioning the officers & men - by arming, specifying the kind size and caliber of arms - & by disciplining prescribing the manual exercise evolutions &c.

Mr. Sherman withdrew his motion.

Id. The limited scope of Congressional

(footnote continued)

objects."). The Federalist No. 45 (Madison). In addition, it is not plausible that the framers were so inconsistent as to state this overriding tenet of federalism only in the Militia Training Clause, but not in other parts of Article I, § 8.

authority, as explained by delegate King, demonstrates that the Militia Clause was designed to restrict narrowly the federal government's ability to affect the training of the militia.

The purpose of the Militia Clause to establish a check upon the federal government and to preserve local influence over the militia became even clearer when the debate over the militia continued in the state ratification conventions. Despite his earlier, unsuccessful proposal for complete federal control over the militia,^{10/} Alexander Hamilton acknowledged that the Convention's reservation of state control over the militia was a significant check upon the federal government:

^{10/} See 2 Farrand 293.

What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia and to command its services when necessary, while the particular States are to have the sole and exclusive appointment of the officers? If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.

The Federalist No. 29 (Hamilton) (Mentor ed.), p. 186 (emphasis added in final sentence only). Of course, the intent to preserve states' "preponderating influence" over the actual operation of the militia is vitiated if the state-appointed officers are merely extensions of the federal government, no longer subject to state influence over

matters such as the schedule, location or purpose of training.

Given the composition of the citizen-army (militia), as well as the states' reserved powers over the militia, Hamilton ridiculed the notion that the federal government could send the militia (as opposed to the federal army) out of state in order to achieve goals that were abhorrent to the members of the militia themselves:

If there should be an army to be made use of as the engine of despotism, what need of the militia? If there should be no army, whither would the militia, irritated at being required to undertake a distant and distressing expedition for the purpose of riveting the chains of slavery upon a part of their countrymen, direct their course, but to the seat of the tyrants, who had meditated so foolish as well as so wicked a project to crush them in their imagined intrenchments of power, and to make them an example of the just vengeance of an abused and incensed people? Is this the way in which usurpers stride to dominion over a numerous and enlightened nation?

Id., p. 187.^{11/} This argument would have been impossible if, as the Eighth Circuit believed, the federal government could use the Armies Clause at will to control the militia over the state's objection.

3. Prior to 1986, Congress Itself
Acknowledged the States'
Authority Over Peacetime
Militia Training.

In the nearly 200 years prior to the Montgomery Amendment, four times Congress passed major legislation affecting the general organization and administration of the National Guard. None of these acts infringed upon the authority of the states to control the

^{11/} Likewise, Madison argued that the federal government would not "drag the militia unnecessarily to an immense distance This . . . would be unworthy of the most arbitrary despot," 3 J. Eliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, pp. 381-82.

peacetime training of the militia. Rather, Congress respected and endorsed the same limitations under the Militia Training Clause upon which Minnesota relies in this case.

For instance, in the Dick Act of 1903 (Act of Jan. 21, 1903, c. 196, 32 Stat. 775), it was only "on the request of the governor" that a state's militia could participate in the training given the regular army. 1903 Act, § 15, 32 Stat. 777-778. See also H.R. Rep. 1066, 82d Cong., 1st Sess., p. 5 (1951).

Similarly, in the National Defense Act of 1916 (Act of June 3, 1915, c. 134, 39 Stat. 166), Congress explicitly preserved certain state authority in National Guard matters, including in Section 61 of the Act, the "right of the States . . . in the use of the National Guard within their respective borders in

time of peace ..." 39 Stat. 166 at 198. See also Section 107, 39 Stat. 209.

Even when the concept of dual federal and state enlistment (see below, pp. 34-48) was enacted by the National Defense Act of 1933, Act of June 15, 1933, c. 87, 48 Stat. 153, Congress respected state peacetime control of the militia. The only type of federal control envisioned by the Congress was the power to make the militia "immediately available" upon "the declaration of an emergency by Congress and without the necessity of draft legislation." S. Rep. No. 135, 73d Cong., 1st Sess., p. 2 (1933). "Pending the declaration of such an emergency, control of the Guard by the respective States is unaffected and in nowise impaired." Id. Absent declaration of an emergency, the President could order officers of the National Guard of the United States to

active duty only "with their consent." 1933 Act, §§ 4, 18; 48 Stat. 155, 160 (1933). The Act provided that "in time of peace, [the members of the National Guard] shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States." Id., § 5, 48 Stat. 156. The extent of -- and limits upon -- the changes made by the 1933 Act are well summarized in the Senate Report that accompanied the Act:

"The changes proposed are simple. The bill proposes to make the National Guard of the United States a reserve component of the Army of the United States, so as to eliminate the delay incident to draft, leaving its control, officering, and discipline except when ordered out pursuant to an emergency declared by Congress, with the respective States, just as at present. The relation of the Guard to the respective States during peace is in nowise affected or altered." S. Rep. No. 133, 73d Cong., 1st Sess., p. 2 (1933) (emphasis added).

All that remained -- prior to the Montgomery Amendment -- was the codification of this implicit acknowledgement of state power over training. This codification occurred through the Armed Forces Reserve Act of 1951, provisions of which became 10 U.S.C. § 672(b), (d). This provision was enacted after Congress received the testimony of the President of the National Guard Association, who pointed out that a proposal for more complete "federalization" of the Guard would have unconstitutionally undermined the states' proper role in governing the militia, violating "article I, section 8, clause 16 ... which reserves to the States the appointment of officers and the authority of training the militia ...". Reserve Components: Hearings on H.R. 4860 before the House Committee on Armed

Services, 82d Cong., 1st Sess., p. 476 (1951). Such an arrangement would disrupt the basic constitutional principle that the Guard must be "responsive to the orders of the governor". *Id.* at 478.

The Subcommittee drafting this legislation apparently found his comments persuasive, for the final version of the 1952 Act included the explicit gubernatorial veto provisions of §§ 672(b), (d). The provisions thus codified what the Constitution requires, and what Congress had respected through the Acts of 1903, 1916, and 1933: that the individual states control peacetime training of the National Guard. To this day, this principle underlies other laws in addition to 10 U.S.C. § 672.^{12/}

^{12/} See, e.g., 10 U.S.C. § 269(g) (requiring governor's consent before a

C. The United States Cannot Rely
On the Dual Enlistment Concept
to Justify Federal Training.

The United States has argued that what is forbidden by the Militia Training Clause is permitted by the Armies Clause, U.S. Const. art. I, § 8, cl. 14. The essence of this argument is that, because, under federal law, National Guard members must enlist in both the federal and state National Guard, the Federal Government may constitutionally rely upon the federal enlistment in order to issue the same

(footnote continued)

member of the National Guard of the United States may be transferred to the Standby Reserve); 10 U.S.C. § 2238 (prohibiting relocation or withdrawal of units of the National Guard of the United States without the governor's consent); 32 U.S.C. § 104(c) (President may not make certain changes in a National Guard unit without the Governor's approval).

training orders to the militia that it could issue to the regular army.

This is truly a principle without limit. If the federal government can force state officers and employees to have federal status, and then use the federal status to avoid express constitutional limits on federal authority (as exemplified by militia training), then state sovereignty exists in name only. Cf. Hopkins Savings & Loan Association, supra.

The general language of the Armies Clause was never intended to authorize federal training of the militia. To do so would "displac[e] the explicit limitation on federal" authority stated in the Militia Training Clause. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 117-118 (1984) (construing Eleventh Amendment). This

cannot be the law. See id., pp. 109, n.17. ("Article III confers no jurisdiction on this Court to strip an explicit [provision] of the Constitution of its substantive meaning.").^{13/}

1. Congress May Not Train The Militia Under The Army Clause.

The notion underlying the respondents' position appears to be that Congress could use the Armies Clause to train the militia itself. This requires a truly radical departure from established principles of constitutional construction. It requires the Court to rule that one clause of the Constitution

^{13/} In the context of this case, this argument does not implicate the validity of the entire dual enlistment scheme. The only question presented is whether, as applied to an area where the Constitution expressly reserves state power, namely militia training, the Federal Government's use of the Armies Clause to train the National Guard violates the Militia Training Clause.

authorizes something (federal authority over militia training) that another clause expressly prohibits.

The respondents' Armies Clause contention directly violates the rule that the powers granted to Congress "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." See Williams v. Rhodes, 393 U.S. 23, 29 (1968). This principle derives from the very nature of our Constitution. The document was intended to be read as a whole, without any contradictory or ineffectual provisions. Marbury v. Madison, supra.

This principle is also a matter of common sense. One would not expect the framers to adopt two incompatible clauses concerning authority over training the militia.

The violence done to the Constitutional structure by the Eighth Circuit's decision is all the more glaring for two reasons. First, Minnesota relies upon specific language governing authority over training the Guard (the Militia Training Clause). Even if one accepts the respondents' view of this case as involving an alleged conflict between constitutional provisions (rather than provisions governing the separate and distinct subjects of militia and army), it makes little sense to give primacy to the general language of the Armies Clause, which does not refer to the militia at all, let alone the authority of training the militia.

In addition, the Second Amendment insures the "continuation and render[s] possible the effectiveness of" the

militia as a check upon abuse of certain military powers by the federal government. See Miller, supra, 307 U.S. at 178. It limits the Army power, by freeing the militia from federal interference. See Note, Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters, 39 Case W. Res. L. Rev., p. 165, 174-177 (1988). Where express, constitutionally allocated powers over the militia are concerned, therefore, the Militia Training Clause, not the Army clause, has priority.

The federal government has correctly conceded elsewhere that its "conception of the dual-enlistment system makes the militia dependent upon Congress for its existence. . . ." Dukakis, supra, 686 F. Supp. at 36. This is fatally inconsistent with Miller, supra, the

Second Amendment and the principles set forth in the previous paragraph.

Nor does case law support the contention that the Armies Clause overrides the Militia Training Clause in a training context. All of the cases cited by the proponents of the dual enlistment justification depend upon the Selective Draft Law Cases, supra. But, in that 1918 case, the court did not pass upon the limited federalization of the Guard effected by the National Defense Act of 1916, let alone the dual status concept, which did not become law until 1933. Moreover, the facts of the case did not present issues regarding the training of the militia, and the Court did not consider any such issues.

This Court's more recent pronouncement on the organization of the National Guard appears in Maryland v.

United States, supra, 381 U.S. at 46-47 and n.8. That case cites the Militia Clause as the sole constitutional basis for the 1916 act, which, as the court noted, provides "the basic structure" for the present day National Guard. The Armies Clause was not mentioned at all. Most importantly, the Court stated that "Training, of course, was a duty reserved to the States by § 91 of the National Defense Act and by Art. I, § 8, cl. 16 of the Constitution." Id., 381 U.S. at 49, n.20. Far from authorizing federal training of the National Guard, this Court has thus recognized that the Constitution still reserves the authority of training the National Guard to the states.

2. The National Guard Of The United States Is Militia.

The District Court of Massachusetts has suggested, without deciding, that

the National Guard in its "federal status" may no longer be militia. Dukakis, supra, 686 F. Supp. at 36. For good reason, the federal government has never advanced this radical proposition. Resting a ruling on this suggestion would be an error of law.

Not only is this argument fully refuted by the objections that it makes the Militia Training Clause meaningless (see above, p. 20), and would amount to unlawful Congressional abolition of the militia (see above pp. 38-39); but the statutes do not support the notion that the members of the National Guard of the United States cease being the organized militia.

The relevant statute defines the organized militia broadly enough to

include the National Guard of the United States.^{14/}

Neither the respondents nor the Eighth Circuit have pointed to a statute

^{14/} The militia includes "all able-bodied males at least 17 years of age and . . . under 45 who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard." 10 U.S.C. § 311(a) (reference to certain persons between the ages of 35 and 65, omitted).

The militia consists of only two classes: the organized militia ("The National Guard and the Naval Militia") and the unorganized militia (all "members of the militia who are not members of the National Guard or the Naval Militia."). 10 U.S.C. § 311(b).

Members of the Army National Guard of the United States must also be "members" of the National Guard. 10 U.S.C. § 101(11). As members of the National Guard, they must be in the organized militia even when in their federal status, since they meet the definition of militia in § 311(a) and since, under § 311(b), the unorganized militia only consists of persons "who are not members of the National Guard or the Naval Militia." (emphasis added).

that strips the National Guard of its status as militia when serving as National Guard of the United States.^{15/}

Even if Congress had provided for abolishing units of the militia when the National Guard is ordered to active federal duty, the Constitution would not allow Congress to exalt a change in the militia's title over substance." [W]hen

^{15/} Any argument that such a provision is implicit would go beyond the provisions of 10 U.S.C. § 672(f) and raise serious constitutional problems under the Militia Training Clause. It is tantamount to asserting a Congressional power to abolish the militia, as the federal government conceded in the District Court in Dukakis, supra, 686 F. Supp. at 36. Such an argument would violate the rule that, in the absence of a clear statement of Congressional intent, statutes must be construed to avoid constitutional questions, particularly those that involve alleged limits on state sovereignty. See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985); United States v. Bass, 404 U.S. 336, 349 (1971).

this second role -- the Guard as Reserves -- intentionally and effectively removes ultimate control of the Guard from the states, there is a problem. Cf. Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (War Powers do not take precedence over other constitutional rights); Ullman v. United States, 350 U.S. 422, 428 (1956) ('As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion'), reh'g denied, 351 U.S. 928." Hirsch, The Militia Clauses of the Constitution, 56 U. Cinn. L. Rev. 919, 962, n.199 (1988).^{16/}

^{16/} See also Johnson v. Powell, 393 U.S. 920 (1968) (Douglas, J., in chambers) (denying stay of deportation of the National Guard due to mootness), stating that the use of the Guard as a federal reserve unit "play[s] loosely with the concept of 'militia' as used in the Constitution ...".

Where authority over training is concerned, the difference between the Army National Guard and the Army National Guard of the United States exists in name only. There is extensive, mandatory federal control over the National Guard, an identical membership in the federal and state Guard, and a federally imposed disability on the states from having troops other than the National Guard.^{17/}

^{17/} Congress has provided that "In time of peace, a State ... may maintain no troops other than those of its National Guard and defense forces authorized by subsection (c)." 32 U.S.C. § 109(a). U.S. Const. art. 1, § 10, cl. 3. The defense forces are not militia within the meaning of the Constitution, for under § 109(c), they are not subject to a call to federal duty, as the militia must be under clauses 15 and 16. See also Maryland, supra. Thus, the only permitted militia is the National Guard.

By statute, this militia must be subject to federal control. The

(footnote continued)

Calling the militia a federal army does not make it so. Substance must prevail over formal labels in constitutional adjudication. See Wisconsin v. J.C. Penney Co., 311 U.S. 435, 443-445 (1940). See also, Federal Housing Administration v. The Darlington, Inc.,

(footnote continued)

National Guard is defined as the Army National Guard and the Air National Guard. § 10 U.S.C. 101(9); 32 U.S.C. § 101(4). The Army and Air National Guard are each defined as the land and air force, respectively that:

- (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I of the Constitution,
- (C) is organized, armed and equipped wholly or partly at Federal expense; and
- (D) is federally recognized.

10 U.S.C. § 101(10), (12); 32 U.S.C. § 101(4), (6). Most significantly, enlistment or appointment as an officer in the Army National Guard is also, ipso facto, enlistment or appointment in the Army National Guard of the United

358 U.S. 84, 91 (1958). Just as the Federal Government could not call the militia into federal service for training without making the Militia Training Clause meaningless (see above, p. 20), so it cannot be permitted to use the Armies clause to nullify the militia's identity as a militia.

D. The Montgomery Amendment Does Not Fall Within Congress' Power to Prescribe Discipline.

In urging the constitutionality of the Montgomery Amendment, certain amici

(footnote continued)

States, a Reserve component of the Army. 10 U.S.C. §§ 3261 (enlistments), 3351 (officers). Officers and enlisted personnel must be discharged from the National Guard if federal recognition is withdrawn. 32 U.S.C. §§ 322, 324. This occurs if the unit in which he serves loses its federal recognition or if he ceases to have the federally prescribed qualifications. 32 U.S.C. § 323. The so-called federal militia, the Army and Air National Guards of the United States, constitute reserve components, "all of whose members are members of the" appropriate state National Guard. 10 U.S.C. § 101(11), (13); 32 U.S.C. § 101(5), (7).

below (but, significantly, not the respondents) have relied upon Congress' power in clause 16 to prescribe "the discipline" according to which the states must conduct the training.

As the District Court held, A-152, n.9, the Montgomery Amendment does not, in fact, prescribe discipline for training to be conducted by the states. It concerns training by the federal government. Moreover, its purely negative command, addressed to state governors, prescribes no discipline whatsoever for training the National Guard. Its sole purpose and effect is to take the training out of the states' hands altogether, without the states' consent.

Even if the Montgomery Amendment purported to prescribe discipline and even if it applied to training by the

states, it would exceed Congress' constitutional authority. The "discipline" clause concerns a narrow area of regulation involving obedience to regulations and orders as well as performance of field exercises and drills,^{18/} or, in the words of Convention delegate King, "the manual exercise evolutions &c." 2 Farrand 385. See also H.R. Rep. No. 1094, 57th Cong., 1st Sess. 19 (1902). This does not extend to specifying, for instance, the location of training. Congress' power to prescribe a uniform discipline^{19/} for training was designed so that the Guard would understand

^{18/} See 32 U.S.C. §§ 501-507 (prescribing certain field exercises, drills, schools, competitions, instructions and other discipline for state National Guard units).

^{19/} In the Constitutional Convention, General Pinckney referred to "serious mischiefs" caused by "a dissimilarity in the militia" and urged that

(footnote continued)

Federal orders and authority, so as to function harmoniously with federal forces when and if called into federal service in the future.

Since the Montgomery Amendment cannot be construed as prescribing the "discipline" for training by the states, but rather, purports to allow the federal executive to exercise the authority over training the militia, it is an invalid usurpation of state power.

E. The Defendants' Policy Concerns Are Exaggerated And Provide No Basis For Altering The Constitution.

The respondents have asserted two policy concerns that, they claim, should

(footnote continued)

"[u]niformity was essential," 2 Farrand 330. The discipline, thus, referred to the general principles that enable units of the militia to comprehend and respond to orders from federal officers. This is vastly different from ordering the militia for training overseas as an instrument of federal foreign policy.

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influence the Court's interpretation of the Constitution. First, they emphasize the importance of training. Second, they assert that the training of the National Guard (in its federal status) should be an instrument of national foreign policy, with which the states should not interfere.

The importance of training is obvious. This cuts in favor of the petitioners' position in this case, not the respondents'. One would not expect a state to object to training as such:

The States are interested in the safety of the United States, the strength of its military forces, and its readiness to defend them in war and against every attack of public enemies Undoubtedly every State has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States Army or in state militia

Hamilton, supra, 293 U.S. at 260. See also, Gilbert v. State of Minnesota, 254 U.S. 325, 329 (1920). The respondents' arguments about the benefits of training are, therefore, largely a non-issue. See A-117 to 120.

The respondents' true emphasis below was on the use of militia training not solely for training, but for foreign policy purposes. This concern is exaggerated. The respondents have many options other than the use of a particular state's National Guard training in peacetime for foreign policy purposes.

Operational missions are authorized by 10 U.S.C. § 673b without the Governor's consent. This statute permits achievement of foreign policy, but only if the policy is not disguised as training, for the statute includes the proviso, "other than for training." Id.

Moreover, even when the federal government claims to be doing nothing more than training, and one state withholds consent, the federal government will often be able to effect its intended purpose by finding another state that will consent, as the debates over the Montgomery Amendment illustrate:

In the case of [Maine], the 48 positions that were requested but denied by our Governor were quickly filled with guardsmen from the 11 other States participating in the maneuvers. While the construction project for which these guardsmen were requested would have provided valuable training experience, the participation of the Maine Army National Guard was not required to complete the project, nor did this project present the only opportunity the Maine Guardsmen would have to obtain this type of training.

132 Cong. Rec. H-6265 (daily ed.) (Aug. 14, 1986) (Remarks of Rep. McKernan of Maine). The respondents have not pointed to a single instance, since 1951, in which they have been unable to

carry out their foreign policy because of any governor's objection. Indeed, they point to no such instance in the 199 years preceding passage of the Montgomery Amendment. Their policy concerns are thus as insubstantial as they are inconsistent with the Militia Training Clause.^{20/}

The final response to the defendants' alleged policy concerns is the simplest. The issue was resolved over 200 years ago. The Constitution provides that militia training is not an instrument of federal foreign policy, unless, of course, the states consent. Since the Constitution grants authority to the state over training the militia, the federal government's disagreement,

^{20/} Concerns over the adequacy of National Guard training are misplaced for similar reasons. See A-49 to 61 (Heaney, S.C.J., dissenting).

on policy grounds, with the constitutional choice is irrelevant.

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government

Immigration and Naturalization Service

v. Chadha, 462 U.S. 919, 944 (1983).

See also Pennhurst, supra, 465 U.S. at 123.

F. Alternatively, the Statute Should Be Construed As Requiring a Federal Declaration of Exigency or Emergency In Order to Render it Constitutional.

The serious Constitutional issues raised by the enactment of 10 U.S.C. § 672(f) should result in invalidation of the statute, as urged by Minnesota. Alternatively, the statute must be construed in order to avoid the constitutional question by holding that, if the

Governor objects to federal training of the National Guard, the executive or Congress must declare a national emergency before overriding the Governor's objection pursuant to § 672(f).

This Court's long standing practice is that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979), citing Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804). In cases raising serious doubt of a statute's constitutionality, the Court has required that "the affirmative intention of the Congress [be] clearly expressed" before construing the statute in a manner that raises such doubts. Id., quoting Benz

v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957). This approach is not only well grounded in precedent, but has the virtue of being "a less intrusive way [than invalidation] of vindicating norms that do in fact have constitutional status." Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev., 405, 469 (1989).

The requirement of a clear Congressional statement is doubly applicable here. This case involves an asserted intrusion into the constitutionally reserved state authority over training the militia. This Court repeatedly has held that Congress must speak clearly if and when it intends to interfere with state interests or to abrogate rights that states enjoy under the Constitution. E.g., Puerto Rico

Department of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1355 (1988) ("a 'clear and manifest purpose' of preemption is always required.").^{21/}

Congress has not clearly stated its alleged intent to allow federal militia training without the constitutionally required declaration of exigency. In 10 U.S.C. § 672(f), it limited the grounds upon which a Governor may withhold consent to federal orders for active duty of the National Guard. It did not, however, purport to remove constitutional

^{21/} See also Atascadero State Hospital, supra, 473 U.S. at 242 (Congress may abrogate the states' immunity from suit in federal court "only by making its intention unmistakably clear in the language of the statute."); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) (Congress must "unambiguously" express its intent to impose conditions on states pursuant to federal grants); Bass, supra, 404 U.S. at 349 (federal criminal statute construed narrowly so as not to preempt state statute criminalizing same conduct).

limitations upon the federal government in exercising authority over training the militia. In fact, it was silent on what procedure or declarations must follow if a Governor attempts to oppose federal orders to active duty for the purpose of training the National Guard.^{22/}

Minnesota and the dissenting opinion below (A-40 to 42) have argued persuasively that, if the federal government wishes to assume authority over the militia on the facts of this case, it must declare a national emergency or exigency. This requirement derives from

^{22/} This is not surprising, since there was exceedingly little debate on the amendment itself, which was introduced as a floor amendment, upon which debate was limited to 10 minutes. See 132 Cong. Rec. H-6264 (daily ed.) (Aug. 14, 1986).

the discussions of the exigency requirement by the framers (e.g. The Federalist No. 23 (Hamilton), p. 153 (Mentor Ed.), (referring to "national exigencies"), as well as the case law (see Selective Draft Law Cases, supra 245 U.S. at 382-383 (discussion of "exigencies" and "necessities" requiring use of Armies Clause powers). See also U.S. Const., art. 8, § 1, cl. 15. The declaration of an exigency is not subject to court challenge, see Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827), but serves the important purpose of assuring the accountability of the official who declares the emergency.

Though not mentioned in § 672(f) or the legislative debate on that section, the exigency requirement coincides with several indicia of legislative intent. As argued above, pp. 28-33, Congress

had always respected state control over the peacetime training of the militia in the absence of a declaration of exigency, at least until 1986. In the absence of a clear statement, it would be illogical to assume that Congress meant to delete the well-established declaration requirement without saying so in the statute or the legislative history. Moreover, the requirement of a declaration meets all the policy objections raised by the respondents and discussed above, pp. 51-56.

In short, if § 672(f) is held to be constitutional, the Court must construe the statutory scheme as preserving the Constitutional requirement that the Federal Government declare a national exigency before overriding a Governor's objection to federal orders for training the National Guard.

CONCLUSION

The judgment of the Eighth Circuit should be reversed and remanded with instructions to render a declaration that 10 U.S.C. § 672(f) violates the Militia Training Clause as applied to training of the National Guard.

Respectfully submitted,

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

**RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL.,
PETITIONERS**

v.

DEPARTMENT OF DEFENSE, ET AL., RESPONDENTS

**On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit**

**BRIEF FOR THE NATIONAL GUARD ASSOCIATION
OF THE UNITED STATES, NINETEEN GOVERNORS IN
THEIR CAPACITIES AS COMMANDERS IN CHIEF OF
THEIR STATE NATIONAL GUARD, AND THE STATES
OF ALABAMA, ALASKA, DELAWARE, FLORIDA,
GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA,
MARYLAND, MISSISSIPPI, MISSOURI, NEVADA,
NEW MEXICO, NORTH CAROLINA, OKLAHOMA,
SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE,
UTAH, VIRGINIA, WISCONSIN, AND WYOMING,
AS AMICI CURIAE SUPPORTING RESPONDENTS ***

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QUESTION PRESENTED

Whether the Militia Training Clause of the United States Constitution, art. I, § 8, cl. 16, requires the federal government to obtain the consent of the Governor before sending state National Guard units on peacetime training missions to foreign countries.

***Amici Joining The National Guard
Association of the United States***

**A. Governors in their capacities as Commanders in Chief
of their state National Guard:**

THE HONORABLE CECIL ANDRUS Governor, State of Idaho	THE HONORABLE RAY MABUS Governor, State of Mississippi
THE HONORABLE HENRY BELLMON Governor, State of Oklahoma	THE HONORABLE JAMES G. MARTIN Governor, State of North Carolina
THE HONORABLE TERRY E. BRANSTAD Governor, State of Iowa	THE HONORABLE BOB MARTINEZ Governor, State of Florida
THE HONORABLE CARROLL A. CAMPBELL Governor, State of South Carolina	THE HONORABLE BOB MILLER Governor, State of Nevada
THE HONORABLE GASTON CAPERTON Governor, State of West Virginia	THE HONORABLE BUDDY ROEMER Governor, State of Louisiana
THE HONORABLE GARREY CARRUTHERS Governor, State of New Mexico	THE HONORABLE WILLIAM DONALD SCHAEFER Governor, State of Maryland
THE HONORABLE MICHAEL N. CASTLES Governor, State of Delaware	THE HONORABLE GEORGE A. SINER Governor, State of North Dakota
THE HONORABLE WILLIAM P. CLEMENTS, JR. Governor, State of Texas	THE HONORABLE JAMES R. THOMPSON Governor, State of Illinois
THE HONORABLE JOE FRANK HARRIS Governor, State of Georgia	THE HONORABLE TOMMY G. THOMPSON Governor, State of Wisconsin
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INTEREST OF AMICI

The National Guard Association of the United States (NGAUS) is a nonprofit organization composed of commissioned officers and warrant officers of the Army National Guard or Air National Guard of the various States who are simultaneously Reserve Officers with equivalent ranks in the Army or Air National Guard of the United States. Current membership in NGAUS is approximately 58,000. NGAUS is joined here by the

Governors of 19 States who, under the laws of their respective States, are the Commanders in Chief of their state National Guard when those units are not called into federal service. NGAUS is also joined by 23 States through their Attorneys General.

Because of their dual status, members of NGAUS owe a dual allegiance. They are military officers of their respective States, subject to the state Constitution and the orders of the state Governor. At the same time, they are military officers in the Army or Air Force Reserve, subject to the Constitution of the United States and the orders of the President. If the orders of a state Governor and the President do not conflict, this dual status raises no legal or practical difficulty. If, however, members of NGAUS receive conflicting orders from the President and their Governor, they are placed in an untenable situation.

To avoid such conflicts, the United States Constitution carefully delineates the respective spheres of state and federal control over the various state militias, of which the National Guard is the modern counterpart. The Militia Mobilization Clause, art. I, § 8, cl. 15, grants Congress the authority to call the militia into federal service "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Congress also has authority, under the Militia Training Clause, art. I, § 8, cl. 16, "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." To the States is reserved "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." This division of responsibility allows Congress to ensure that National Guard units from the various States can be readily combined into a highly and uniformly trained national force, equipped to meet any emergency that might arise. At the same time, the National Guard is available for service within the individual States and

constitutes a crucial, decentralized counterbalance to the dangers of a standing Army identified by the Framers of the Constitution.

This delicate balance between federal and state control over the militia has kept America strong and free for over 200 years. It is now threatened by both sides in this litigation. Governor Perpich is seeking to arrogate to himself a role in foreign affairs by means of a veto power over federal measures designed to ensure that the National Guard is capable of meeting the exigencies of modern warfare. The federal government, by contrast, is attempting to override the restrictions of the Militia Clauses by invoking its powers under the Army Clause, art. I, § 8, cl. 12, the very powers that the Framers sought to contain by means of a strong, well-disciplined militia.

Amici believe that the proper resolution of this case is to be found in the Militia Training Clause itself. Congress's authority to provide for "organizing, arming, and disciplining, the Militia" is broad enough to encompass orders for National Guard units to conduct peacetime training missions overseas and is a sufficient constitutional basis for sustaining the Montgomery Amendment. Indeed, given the realities of modern warfare and modern geopolitics, such training missions are essential to the development of a unified and effective fighting force. The authority of individual States to conduct the actual "training of the Militia, according to the discipline prescribed by Congress" does not give those States any authority to object to "the location, purpose, type, or schedule" of such training missions. See 10 U.S.C. § 672(f) (1989 Supp.). Thus, this case can and should be resolved without ever reaching the much broader Army Clause argument raised by the federal government. In that way, the unique hybrid status of the National Guard will be preserved, and the balance of power struck by the Framers will be maintained.

STATEMENT

A Short History of the Militia. By all accounts, the performance of the various state militias during our War of Independence was, at best, erratic. Indeed, the militia's lack of training and discipline in the art of war was a constant source of complaint by George Washington to the Continental Congress. See, *e.g.*, Letter from General Washington (Sept. 24, 1776), quoted in *The Militia*, S. Doc. No. 695, 64th Cong., 2d Sess. 23-24 (1917):

To place any dependence upon militia is assuredly resting upon a broken staff. Men just dragged from the tender scenes of domestic life, unaccustomed to the din of arms, totally unacquainted with every kind of military skill (which being followed by want of confidence in themselves when opposed to troops regularly trained, disciplined, and appointed, superior in knowledge and superior in arms), makes them timid and ready to fly from their own shadows. Besides the sudden change in their manner of living (particularly in the lodging) brings on sickness in many, impatience in all, and such an unconquerable desire of returning to their respective homes that it not only produces shameful and scandalous desertions among themselves but infuses the like spirit in others. * * * To bring men to a proper degree of subordination is not the work of a day, a month, or even a year; and, unhappily for us and the cause we are engaged in, the little discipline I have been laboring to establish in the Army under my immediate command is in a manner done away by having such a mixture of troops as have been called together within these few months.

The role of the militia in the new republic was accordingly one of the most hotly debated topics at the Constitutional Convention (see pp. 15-18, *infra*). Most of the Framers wanted to be able to rely on the militia as an effective federal force in times of peril so as to eliminate the need for a large standing army. At the same time,

there was considerable anti-Federalist sentiment in favor of the States retaining plenary control over their respective militias. The Framers, as in so many areas, reached a delicate compromise between the power of the federal government and the autonomy of the States. They granted to Congress the authority to "call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Art. I, § 8, cl. 15 (the Militia Mobilization Clause). And they specified that, on these occasions, Congress would "govern[] such Part of [the Militia] as may be employed in the Service of the United States." Furthermore, in order to ensure that each state militia was prepared to perform its national duties when called upon to do so, the Framers granted Congress authority to "provide for organizing, arming, and disciplining, the Militia," while reserving to the States "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Art. I, § 8, cl. 16 (the Militia Training Clause).

Congress, however, was slow to exercise its new power. Flushed with the triumph of the Revolution, and geographically remote from the squabbles of Europe, Congress contented itself with designating virtually every able-bodied man between 18 and 45 as a member of his state militia. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271. As far as "arming" the militia was concerned, Congress simply required "every citizen so enrolled" to "provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack * * * with a box therein to contain not less than twenty-four cartridges" (*ibid*). For "discipline," Congress specified that "the rules of discipline" adopted by the Continental Congress in 1779 for the Revolutionary Army "shall be the rules of discipline to be observed by the militia throughout the United States" (*id.* § 7 at 273). See 13 *Journals of the Continental Congress* 384 (Mar. 29, 1779), adopting Baron de Steuben's *Regulations for*

the Order and Discipline of the Troops of the United States (reprinted by Greenleaf's Press, New York 1794). And for "organization," Congress specified the division of the troops and the necessary officers and required brigade-inspectors to conduct inspections of the men while under arms, "superintend their exercise and manoeuvres, and introduce the system of military discipline before described" (Act of May 8, 1792, § 10 at 273).

Such was the militia of the United States, in times of war and in times of peace, for over a century. Not surprisingly, the militia performed well in times of peace, devoting itself to "showy parades in harlequin uniforms." *Federal Aid in Domestic Disturbances*, Sen. Doc. No. 263, 67th Cong., 2d Sess. 205 (1922). Equally unsurprising was the inadequate performance of the militia when called forth to federal service. Following a particularly poor showing in the Spanish-American War, due to inadequate and incompatible training of units, President Roosevelt declared that "[o]ur militia law is obsolete and worthless" and sought reforms. *Annual Message to Congress* (Dec. 3, 1901).¹

In the Act of January 21, 1903, ch. 196, § 1, 32 Stat. 775, Congress established for the first time "the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia," with the remainder of able-bodied male citizens to be known as

¹ In a message to Congress, Secretary of War Elihu Root elaborated on the need for a new militia law:

It is really absurd that a nation which maintains but a small Regular Army and depends upon unprofessional citizen soldiery for its defense should run along as we have done for one hundred and ten years under a militia law which never worked satisfactorily in the beginning, and which was perfectly obsolete before any man now fit for military duty was born. The result is that we have practically no militia system, notwithstanding the fact that the Constitution makes it the duty of the Federal Congress "to provide for organizing, arming, and disciplining the militia."

S. Rep. No. 2129, 57th Cong., 2d Sess. 1 (1902).

"the Reserve Militia." The Act provided financial grants to state National Guard units and specified that "[t]he organization, armament, and discipline of the organized militia * * * shall be the same as that which is now or may hereafter be prescribed for the Regular and Volunteer Armies of the United States." *Id.* § 3 at 775. The National Defense Act of 1916, ch. 134, 39 Stat. 166, further expanded federal financial support for Guard units, and also prescribed qualifications for National Guard officers, providing for their recognition by federal authorities only should they be found qualified.

In the years following World War I, the National Guard was reconstituted in more dramatic fashion to reflect the experience of that conflict. Because the structural organization of the Army differed from that of the National Guard, the government was unable to incorporate volunteer Guard units as units, but instead drafted Guard members individually. Upon demobilization, the Guard units had to be painstakingly reconstituted. This process not only hurt National Guard morale; it was also viewed as bad federal defense policy, given that trained units are generally in short supply at the beginning of a crisis. Accordingly, Congress passed the Act of June 15, 1933, ch. 87, 48 Stat. 153, "so as to eliminate the delay incident to draft," to keep Guard units intact, and "to preserve the traditional character of the Guard as that of volunteer rather than draftees." S. Rep. No. 135, 73d Cong., 1st Sess. 2 (1933).

The 1933 Act established the National Guard of the United States (NGUS) as a reserve component of the Army of the United States. Appointment as an officer in a State's National Guard carried with it a parallel appointment as an officer in NGUS; this so-called "dual enlistment" concept is still in place today. While maintaining the character of the National Guard as essentially a state organization in times of peace, the 1933

Act granted the President power to order the National Guard into federal service whenever "Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army" (§ 111 at 160). Guard members ordered into active federal service were relieved from duty in their state National Guard until demobilized, at which point they automatically resumed service in their Guard units (*ibid.*).

In 1952, Congress extended the circumstances in which the federal government could call Guard members into active service. In two provisions, now codified at 10 U.S.C. §§ 672(b) & (d), Congress provided that the Secretary of Defense or his designee could order any Guard unit into active duty "for not more than 15 days a year" with the consent of the Governor, and could retain persons on active duty for longer periods of time with the consent of both the individual and of his Governor. Since 1952, yearly orders to active duty for training purposes, usually for two weeks at a time, have been essential in preparing the Guard for its role as a reserve component of the United States armed forces, a role that is now vital to our ability to meet any military exigency.

In 1986, as part of the nation's Total Force military capability, 18 of the 28 total Army divisions available in the event of war were provided in whole or in part by the Army National Guard. Similarly, the Air National Guard provided 73 percent of the nation's air defense interceptor forces, 52 percent of tactical air reconnaissance, 34 percent of tactical airlift, 25 percent of tactical fighters, 17 percent of aerial refueling, 13 percent of air rescue and recovery forces, 14 percent of special operations forces, and 24 percent of tactical air support forces. See J.A. 12-13 (Testimony of James H. Webb, Jr.).

Facts and Proceedings Below. National Guard troops are regularly sent for training to foreign countries.² They proceed under federal orders on "active duty for training," as authorized by 10 U.S.C. §§ 672(b) & (d), in order to come within the protections of the various "status of forces agreements" that the United States has with foreign nations and to ensure the availability of federal benefits if they are killed or injured. J.A. 21. But during training they remain within their state Guard units under the direct command of state-appointed officers. These officers conduct the actual training of their units under the general direction of the Army.

In 1985, National Guard units began conducting training missions in Honduras. Specifically, over a three year period, the Guard built a road connecting the Northern Yoro province, an agricultural center in the interior of the country, to the town of Olanchito, 50 kilometers away, with access from there to the seaport of Lacey. These missions accordingly served the dual purposes of training the National Guard to perform a difficult engineering feat in the mountains and jungles of Central America while at the same time providing humanitarian aid to an important ally in a conflict-ridden region. Several Governors objected to this use of their National Guard and threatened to withhold their consent. Congress responded by passing the Montgomery Amendment, 10 U.S.C. § 672(f) (1989 Supp.), which states that "[t]he consent of a Governor [to a call to active duty for peacetime training] may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty."

² As of the end of 1986, more than 42,000 National Guard members had participated in overseas training and 69 exercises in 46 countries. J.A. 20 (Testimony of James H. Webb, Jr.).

Petitioner Rudy Perpich, the Governor of Minnesota and Commander in Chief of the Minnesota National Guard, filed suit seeking a permanent injunction against enforcement of the Montgomery Amendment. Governor Perpich also sought a declaratory judgment that the amendment violated the Militia Training Clause of the United States Constitution insofar as it infringed on the power reserved to the States to "train" their respective militias. The District Court granted summary judgment for respondents (Pet. App. 142-153), holding that "the Militia clause does not restrain Congress' authority [under the Army Clause] to train the National Guard while the Guard is in active federal service" (*id.* at 150).

A three-judge panel of the court of appeals reversed. The case was then reargued *en banc*, the panel opinion was vacated, and the judgment of the district court affirmed (Pet. App. 1-62). The full court, with two judges dissenting, held that, when Guard units are ordered into federal service for training, they are no longer in the militia; they are part of the Army. "The statutes authorizing this federal action," the court stated (*id.* at 10), "are statutes grounded upon the army clause." "Congress' army power is plenary and exclusive. The reservation to the States of authority to train the militia does not conflict with Congress' authority to raise armies for the common defense and to control the training of federal reserve forces." *Id.* at 13. Thus, the court held, "[t]he Montgomery Amendment is a constitutional exercise of Congress' army powers" which is "beyond the reach of the militia clause." *Id.* at 10, 13.

SUMMARY OF ARGUMENT

Petitioners' assertion (Br. 8-9) that the States have complete dominion over the peacetime training of the National Guard is belied by the language of the Militia Training Clause, art. 1, § 8, cl. 16. "[T]hat provision is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard)." *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973). The States exercise their authority only through the power to appoint officers and to conduct the "training of the Militia according to the discipline prescribed by Congress." Art. I, § 8, cl. 16 (emphasis added). It is clear from contemporary sources that the word "discipline" was used by the Framers to describe whatever training regimen Congress thought necessary to ensure that the militias of the various States could be readily combined into a highly and uniformly trained national force, equipped to meet any emergency that might arise.

Current political events and modern technology dictate that our Nation's first line of defense is no longer contiguous with its borders. If the National Guard is to fulfill its role as part of our Total Force military capability, it must be trained to respond rapidly to emergencies throughout the world. And that in turn requires that it be trained throughout the world. To argue, as petitioners do, that the "discipline" prescribed by Congress cannot reflect these modern realities is as foolish as to contend that the "arms" provided by Congress are limited by the Constitution to the musket or firelock of the Revolutionary War. The Executive Branch has determined that overseas training of the National Guard is "an operational necessity" (J.A. 13). It follows that the President, as part of his delegated authority to prescribe the discipline according to which the National Guard must be trained, has the power to mandate overseas training without fear of being countermanded by individual Governors.

The United States, however, is not content to rest upon its authority under the Militia Training Clause to send Guard units overseas. It is seeking to use the "dual enlistment" of members in both the National Guard and the Army or Air Force Reserve to assert untrammelled command and control over the Guard. But the Militia Clauses themselves contemplate a hybrid state/federal militia, with shared control of just the sort that now exists over the National Guard. And Congress established the dual enlistment system for the express purpose of implementing, not circumventing, the Militia Clauses. Thus, the hybrid nature of the National Guard does not create a backdoor through which the federal government can obtain units whenever it does not want to be bothered with the restrictions of the Militia Clauses. The United States is seeking nothing less than to read those restrictions out of the Constitution.

The Framers were not insensible to the necessity for federal control over the militia in times of military exigency. But they greatly feared any such aggregation of power in times of peace. Accordingly, they "decentralized" the military by giving to the States the power to appoint officers and conduct the peacetime training of the militia "according to the discipline prescribed by Congress." The militia of citizen soldiers, so constituted, is not a quaint relic of antiquity; it is an essential counterbalance to the standing Army of professional soldiers which the Framers uniformly feared. This case can and should be resolved under the Militia Training Clause itself without ever reaching the broader argument urged by the United States. In that way, the unique status of the National Guard will be preserved, and the balance between state and federal power struck by the Framers will be maintained.

ARGUMENT

THE MILITIA TRAINING CLAUSE GRANTS CONGRESS AUTHORITY TO SEND STATE NATIONAL GUARD UNITS OVERSEAS ON PEACETIME TRAINING MISSIONS WITHOUT OBTAINING THE CONSENT OF THEIR STATE GOVERNORS

This Court has already recognized that "[t]he National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution." *Maryland v. United States*, 381 U.S. 41, 46, vacated on other grounds, 382 U.S. 159 (1965). No one has ever disputed that essential point. Indeed, by federal statute the Army and Air National Guard are each defined as the land and air force, respectively, that "is trained and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution." 10 U.S.C. §§ 101 (10) (B) & 12 (B). See also 32 U.S.C. §§ 101 (4) & (6) (defining the National Guard as "the organized militia of the several States and Territories").³

Under the Militia Training Clause, therefore, the States have authority to train the National Guard "according to the discipline prescribed by Congress." The first question presented to the Court is whether "the discipline prescribed by Congress" may extend to prescribing the location of training. The issue, in other words, is whether the Militia Training Clause itself permits Congress to mandate overseas training of the National Guard without first obtaining the consent of state Governors. If, as we contend, it does, then the Montgomery Amendment is plainly constitutional under the Militia Training Clause, and the Court need never reach

³ Nor is it disputed that the States have an absolute right to maintain such a militia, a right guaranteed not only by the Militia Clauses themselves, but reinforced by the Second Amendment to the Constitution. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (the Second Amendment was added "[w]ith obvious purpose to assure the continuation and render possible the effectiveness" of the various state militias).

the much broader issue raised by the United States of whether Congress can exercise plenary control over the National Guard under the Army Clause, notwithstanding the limitations of the Militia Clauses.

A. The Language And History Of The Militia Training Clause Demonstrate That The Framers Intended To Give Congress Authority To Ensure The Uniform And Effective Training Of The Militia

Petitioners' assertion (Br. 8-9) that the States have complete dominion over the peacetime training of the National Guard is belied by the language of the Militia Training Clause. "[T]hat provision is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard)." *Gilligan v. Morgan*, 413 U.S. 1, 6 (1973). The States exercise their authority only through the power to appoint officers and to conduct the "training of the Militia according to the discipline prescribed by Congress." The States, in other words, are the "drill-sergeants;" but it is Congress that prescribes the drill. See 2 M. Farrand *Records of the Federal Convention of 1787* 385 (rev. ed. 1966) (speech by Elbridge Gerry).

The *Oxford English Dictionary* (1933) defines "discipline" in its military application as: "Training in the practice of arms and military evolutions; drill. Formerly, more widely: Training or skill in military affairs generally; military skill and experience; the art of war."⁴

⁴ As examples of the broad and comprehensive meaning of the word "discipline," the OED cites Gibbon (1776): "It was the rigid attention of Aurelian, even to the minutest articles of discipline, which bestowed such uninterrupted success on his arms;" Lee (1775): "Without discipline armies are fit only for the contempt and slaughter of their enemies;" and Harris (1659): "School of war * * * where all the Martiall Spirits resorted, to learn Discipline, and to put it in practice." Dr. Johnson's *Dictionary of the English Language* (1755) gives as one definition simply "Military regulation," with a quotation from *Richard III*: "This opens all your victories in Scotland,/Your discipline in war, wisdom in peace."

It is in just this broad sense that the word "discipline" was used in Eighteenth Century America. For example, the Continental Congress adopted Baron de Steuben's *Regulations for the Order and Discipline of the Troops of the United States* because "Congress judg[ed] it of the greatest importance to prescribe some invariable rules for the order and discipline of the troops, especially for the purpose of introducing an uniformity in their formation and manoeuvres, and in the service of the camp." 13 *Journals of the Continental Congress* 385 (Mar. 29, 1779). And it was precisely to introduce such "uniformity" in training that the Framers of our Constitution granted Congress the power to prescribe the discipline of the militia.

There was a general tension at the Convention between the desire to form a strong and effective central government and the fear that such a central authority would overshadow the individual States and ultimately deprive the people of their newly won freedom. At no time during the Convention was that tension more palpable than in the attempt to give the federal government the military means to provide for the common defense, while retaining sufficient military forces under state control to oppose, by force of arms if necessary, any move towards tyranny.

The Framers ultimately settled upon the plan laid out by George Washington in his *Sentiments On a Peace Establishment* (1783), reprinted in H.R. Rep. No. 141, 73d Cong., 1st Sess. 23 (1933). General Washington called for a small standing army in times of peace to be supplemented by the various state militias in times of war and other national exigency. He stressed, however, that such a plan would only work if the federal government could ensure "[a] well organized militia," trained "upon a plan that will pervade all the States, and introduce similarity in their establishment, manoeuvres, exercise, and arms." *Ibid.* Washington believed that such a grant of power over the peacetime training of the militia was essential to ensure an effective, na-

tional military force that would render a large standing army unnecessary. The alternative, as he knew from bitter experience, was to permit the States to neglect the training of the militia, a neglect that would result in a number of incompatible and ineffective units that could not readily be mobilized in defense of the country.

Despite General Washington's prestige, the issue was sharply contested at the Constitutional Convention in Philadelphia as well as at the ratifying conventions in the various States. The original plan of the Constitution contained only the Militia Mobilization Clause. See 2 Farrand at 330. George Mason proposed granting Congress the power "to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointment of the Officers." He urged that "uniformity [was] necessary in the regulation of the Militia, throughout the Union." *Ibid.* General Pinckney agreed that "[u]niformity was essential" and stressed that "[t]he States would never keep up a proper discipline of their militia." Oliver Ellsworth protested that such an amendment "went too far" in "submitting the militia to the General Government" and effectively took "[t]he whole authority over the Militia * * * away from the States whose consequence would pine away to nothing after such a sacrifice of power." *Id.* at 330-331. John Dickinson proposed, as a narrower alternative, "to restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia." *Id.* at 331.

The question was submitted to a "Grand Committee" of eleven, who proposed the Militia Training Clause, largely in its current form. 2 Farrand at 356. Concerns were expressed by some delegates over the broad scope of Congress's authority to "discipline" the militia. Ellsworth remarked "that the term discipline was of vast extent and might be so expounded as to include all power on the subject." Rufus King attempted to re-

assure Ellsworth that by "disciplining" the committee meant only "prescribing the manual exercise evolutions &c." A number of delegates were not appeased, however. Elbridge Gerry protested that "[t]his power in the United States as explained is making the States drill-sergeants" and would "take the command from the States, and subject them to the General Legislature." *Id.* at 385. Ellsworth and Roger Sherman moved to replace the Militia Training Clause with narrower language, leaving out the word "discipline," that would "refer the plan for the Militia to the General Government, but leave the execution of it to the State Governments." *Id.* at 386. James Madison insisted on retaining the word "discipline":

The primary object [of the clause] is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose; in like manner as the Militia of a State would have been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a *National* concern, and ought to be provided for in the *National* Constitution.

Id. at 386-387 (emphasis in original). Edmund Randolph echoed these concerns and stressed that "[l]eaving the appointment of officers to the States protects the people against every apprehension that could produce murmur." *Id.* at 387. Ellsworth's motion was thereupon defeated by a vote of 10 States to one. *Ibid.*⁵

⁵ At the various ratifying conventions, the Militia Training Clause was defended (and attacked) in similar terms. Patrick Henry, for example, called attention "to that part which gives the Congress power 'to provide for organizing, arming, and disciplining the militia, etc.' By this, sir, you see that their control over our

Alexander Hamilton made the clearest statement in defense of Congress's power to discipline the militia—and the clearest indication of the scope of that power—in *The Federalist Papers*, No. 29 at 182 (Rossiter ed. 1961):

It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert—an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.¹⁰¹

last and best defense is unlimited." 3 J. Elliot *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 52 (1901). Madison, in response, reaffirmed the need for substantial federal authority over peacetime training: "the only possible way to provide against standing armies is to make them unnecessary. The way to do this is to organize and discipline our militia, so as to render them capable of defending the country against external invasions and internal insurrections." *Id.* at 413.

⁶ Petitioners (Br. at 21) make much of Hamilton's statement that the States would retain "the preponderating influence" over the militia. See also Br. of Massachusetts, et al., at 26. But Hamilton made it perfectly clear that it was only "the circumstance of the officers being in the appointment of the States" that would secure to them such an influence; "the regulation of the militia," meanwhile, was confided "to the direction of the national authority." *The Federalist Papers*, No. 29 at 182, 186.

Petitioners also rely (Br. at 22 n.15) on Hamilton's assurance that the militia would not be sent on "distant and distressing expedition[s]." But Hamilton does not cite any want of constitutional authority for such expeditions; the check he foresees is solely a political one. Federal officials are not likely to "commence their career by wanton and disgusting acts of power, calculated to answer

The Militia Training Clause accordingly gave Congress the power to require that each of the state militias and the standing army be uniformly organized, armed and trained, so that in times of national danger they could be fitted together, like individual bricks in a fortress, to form an integrated defense of the union. As General Washington said, with evident relief, in 1795: "In my opinion Congress has the power, by the proper organization, disciplining, equipment, and development of the militia to make it a national force, capable of meeting every military exigency of the United States." Quoted in H.R. Rep. 297, 64th Cong. 1st Sess. 2 (1916).

B. Congress Has Delegated Its Authority Over The Peacetime Training Of The National Guard To The President

Congress has delegated to the President the power to "prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." 32 U.S.C. § 110. Accordingly, the President has the authority to mandate whatever peacetime training he considers necessary to ensure that the National Guard will be a uniform and effective fighting force, readily integrated with the regular Army, and able to respond quickly to any emergency.

The United States apparently views this delegation of Congress's authority under the Militia Training Clause as irrelevant to the present case because, under the dual enlistment concept, the President can order Guard units to train in their capacity as reserve components of the United States armed forces. See Br. in Opp. at 7-8. Under this view, the President can order a Guard unit to "active duty for training" at any time and for any reason, and that unit is then wholly integrated into, and completely under the command and control of, the Army,

no end, but to draw upon themselves universal hatred and execration." *The Federalist Papers*, No. 29 at 187.

notwithstanding the carefully-crafted balance between state and federal power in the Militia Clauses.

Setting aside the question whether Congress would have the constitutional authority to establish such a regime, it does not appear to have been Congress's intent to do so. Current federal law in fact favors the alternative view that the President directs the training of the National Guard qua National Guard, without first mobilizing them as part of the regular Army. The Constitution draws a fundamental distinction between the peacetime training of the National Guard under Clause 16 and its mobilization in times of national crisis under Clause 15, and federal law is properly read to follow that distinction. Indeed, Congress itself has stipulated that the Army and Air National Guard are "trained * * * under the sixteenth clause of section 8, article I, of the Constitution." 10 U.S.C. §§ 101(10)(B) & 12(B).

As already noted (see pp. 7-8, *supra*), the primary purpose of the "dual enlistment" concept was to permit National Guard units to be mobilized intact in times of emergency. The peacetime training of the National Guard continues as before, with one exception. The President was given the peacetime authority temporarily to place Guard units on "active duty for training" status as part of the Army or Air Force reserve. See 10 U.S.C. §§ 672(b) & (d). Putting Guard members in federal status for training serves two purposes: it brings Guard members within the protections of the various "status of forces agreements" that the United States has with foreign nations; and it ensures the availability of federal benefits if they are killed or injured. J.A. 21 (testimony of James H. Webb, Jr.). But it does not take the National Guard wholly outside the strictures of the Militia Training Clause.⁷

⁷ When called to active duty for training, Guard members are technically relieved from duty in their state units. 32 U.S.C. § 325. Accordingly, no conflict arises between federal orders directing the

On these training missions, Guard members are still under the direct operational command of officers appointed by the States under the Militia Training Clause, and it is those state-appointed officers who play the role of "drill-sergeants." Individual Guard units may be, and usually are, fitted into a broader federal structure and thereby subjected as units to federal direction, but within units the actual training is conducted by state-appointed officers. Such overall federal coordination, coupled with the line authority of state-appointed officers, strikes precisely the balance required by the Militia Training Clause. Accordingly, this "quasi-federalization" of the Guard, for purposes of peacetime training, is both contemplated and permitted by the Militia Training Clause. It need not call into play Congress's general powers under the Army Clause.

C. The President Has Determined That The Realities Of Modern Warfare Require The National Guard To Train Throughout The World

Petitioners and their amici themselves acknowledge that the word "discipline" in the Militia Training Clause refers to the "substance or content" of training (Pet. Br. at 46). See *id.* at 9 ("uniform training exercises"); *id.* at 10 ("training regimen"); *id.* at 18 ("standards for training"); Br. of Massachusetts, et al., at 50 ("performance of field exercises and drills"). They nonetheless contend that Congress's authority (and, hence, by delegation, the authority of the President) to prescribe such discipline is "narrow" because the field exercises and drills of the Continental Army consisted only of

training of the Guard and possible state orders putting the Guard to some other use. But this administrative transfer for purposes of directing a training exercise does not work a wholesale absorption of the Guard members into the federal military. Indeed, Congress expressly disclaimed any intent to "federalize" the National Guard beyond the minimum required to ensure uniform and effective training. S. Rep. No. 1795, 82d Cong., 2d Sess., reprinted in 1952 U.S. Code Cong. & Admin. News 2005, 2015.

"the manual exercise evolutions &c'" (*id.* at 50 (quoting 2 Farrand at 385)).

But the word discipline cannot be read to freeze in place the training of a bygone age. As Hamilton remarked, with his usual prescience: "What plan for the regulation of the militia may be pursued by the national government is impossible to be foreseen." *The Federalist Papers*, No. 29 at 184. To argue that the "discipline" prescribed by Congress cannot reflect the realities of modern warfare is as foolish as to contend that the "arms" provided by Congress are limited by the Constitution to the musket or firelock of the Revolutionary War.

This Court has recognized that the Militia Training Clause gives Congress "authority to prescribe and regulate the training and weaponry of the National Guard" and that implicit in that authority is the need to "make comparative judgments on the merits as to evolving methods of training, equipping and controlling" the Guard. *Gilligan v. Morgan*, 413 U.S. at 8 (emphasis added). As the art of war changes, so too must the discipline and weaponry prescribed by Congress. And the art of war has changed fundamentally since 1787. Marching and presenting arms on the Cambridge Common are no longer sufficient training.

Even the antiquated training regimen of Baron de Steuben stipulated (at 20) that "[t]he captain must exercise his company in different sorts of ground." See also *The Federalist Papers*, No. 56 at 348 (Madison) (noting that although "[t]he art of war teaches general principles of organization, movement, and discipline, which apply universally," in prescribing discipline for the militia Congress must take into account "[t]he general face of the country, whether mountainous or level, most fit for the operations of infantry or cavalry"). If that was true at a time when the art of war consisted of little more than marching and firing in line, it is cer-

tainly true today when the Guard may be called upon in times of exigency to respond with sophisticated weapons to crises throughout the world.

Current political events and modern technology dictate that our Nation's first line of defense is no longer contiguous with its borders. If the National Guard is to fulfill its role as part of our Total Force military capability, it must be trained to respond rapidly to emergencies throughout the world. And that in turn requires that it be trained throughout the world. The modern weapons with which Congress has armed the Guard—for example, high altitude supersonic fighters, jet transports, M-1 main battle tanks, laser-guided and optically-guided anti-tank missiles—are all sensitive to the climatic and geographical environment in which they are maintained and operated. Unless Guardsmen are trained to use those weapons in climatic and geographical conditions outside the United States, they will not be able to respond effectively in times of emergency. "The added realism of training outside the United States, in terrain, climate, transportation and use of equipment, differences in operating procedures, and language, provides the best environment that tests every member of a unit and enhances readiness." J.A. 20 (testimony of James H. Webb, Jr.).

Even petitioners acknowledge (Br. at 46) that "training on the basis of terrain or climate" is part of the "substance or content" of training that the President may prescribe. It must follow that, in order to assure uniform training, the President may choose the location of training and that state Governors have no authority to veto that choice. Guardsmen must train wherever the regular Army trains so that they can "discharge the duties of the camp and of the field with mutual intelligence and concert." *The Federalist Papers*, No. 29 at 182 (Hamilton). As then Assistant Secretary of Defense Webb explained to Congress (J.A. 13):

We have increasingly staked our national security on the ability to mobilize, deploy, and employ combat ready National Guard and Reserve members and units anywhere in the world rapidly. Consequently, effective and realistic training throughout the world is a necessity if we are to rely on the men and women of the National Guard to perform their federal mobilization missions within current deployment schedules. Adequate training for National Guard members who have become more directly involved in our defense posture under the Total Force Policy is an operational necessity and also an obligation, owed to those guardsmen who will be committed to the battlefield, to enhance their proficiency and ability to fight and survive.

Under these circumstances—where the Executive Branch has determined that overseas training of the National Guard is “an operational necessity”—it defies rational analysis to contend that the President, as part of his delegated authority to prescribe the discipline according to which the National Guard must be trained, has no power to mandate overseas training, but must go hat in hand to the nation’s Governors to request that such training be conducted. The Montgomery Amendment simply prescribes a necessary zone of flexibility for the President so that he can devise an effective training regimen for the Guard.

D. The Court Should Decide This Case Under The Militia Training Clause In Order To Preserve The Delicate Balance Between State And Federal Authority Over The Militia

Our current Total Force policy largely follows the lines laid out by George Washington over 200 years ago in his *Sentiments On A Peace Establishment*. We have today a small, all-volunteer standing Army supplemented by highly and uniformly trained National Guard units prepared to respond quickly and effectively to any emergency. The training, the weapons, and the geopolitical

realities have all undergone fundamental changes since the early days of our Republic; but the constitutional balance between state and federal authority over the militia has been preserved. Both sides in this litigation seek to alter that balance.

The attempt of Governor Perpich to hamstring federal efforts to ensure a uniformly trained, effective militia is easily parried. Just as the realities of modern economic life have led the federal government to exercise a greater and more intrusive role in traditional state affairs under the Commerce Clause, so too the realities of modern warfare and modern politics have led Congress to exercise a greater and more intrusive role in the training of the National Guard. In both cases, the language of our Constitution is not so rigid as to preclude this increase in federal authority.

But if our constitutional division of power between the States and the federal government is to have any meaning, there must be limits beyond which federal encroachments may not extend. The United States is unnecessarily using this case to test those limits. The United States is seeking to exercise untrammelled command and control over the National Guard at all times and in all circumstances by the simple expedient of invoking the Army Clause. The United States, in short, wants to read the Militia Clauses out of the Constitution (or, at least, read the National Guard—contrary to Congress’s express intent—out of the Militia Clauses).

Apparently, the United States is primarily concerned not with the Militia Training Clause, which governs this case, but with the Militia Mobilization Clause, which provides that the militia may be called forth “to execute the Laws of the Union, suppress Insurrections, and repel Invasions.” The United States fears that “[i]f the National Guard of the United States were subject to these limitations, this would call into question the constitutional authority of the President to use these forces

in the defense of the interests of the United States outside our territorial boundaries." See *Opposition to Motion of Amicus Curiae NGAUS for Leave to Participate in Oral Argument* at 2. This concern is unfounded.

Clause 15 does not impose any inflexible limitation on the authority of the President to use the National Guard in defense of U.S. interests overseas. This Court has previously declared that the circumstances listed in Clause 15 are examples of "exigenc[ies]" suitable for calling forth the militia, not rigidly restrictive categories. See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28 (1827). Given the international scope of our peacetime commitments, the President's authority to deploy military force throughout the world must be a broad one. And whenever American troops take the field to meet a military exigency—be it in the jungles of Vietnam, on the beaches of Grenada, over the skies of Libya, or in the streets of Panama City—the President may mobilize National Guard units as needed.⁸

In any event, even if the Militia Mobilization Clause did impose a limitation on the range of military circumstances in which Congress could call forth the National Guard, Congress could clearly overcome that limitation by invoking its War Powers.⁹ In the *Selective Draft*

⁸ This Court has held that the President has exclusive authority, pursuant to congressional delegation, to decide whether "the exigency [contemplated by Clause 15] has arisen;" his decision is binding on all other persons and cannot be challenged in court. *Martin v. Mott*, 25 U.S. at 28.

⁹ Invocation of the War Powers does not require a formal declaration of war under art. I, § 8, cl. 11. It may be premised on action like the Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), in which Congress stated that it "approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." See *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969); *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968).

Law Cases, 245 U.S. 366, 375 (1918), the Court held that *in times of armed conflict* the federal government can directly raise and deploy any and all military forces without regard to the Militia Mobilization Clause. That holding is clearly correct, for as Madison recognized, the federal government's authority must certainly be "most extensive in times of war and danger." *The Federalist Papers*, No. 45 at 293.

But the United States cannot properly invoke the *Selective Draft Law Cases* in this case, which involves peacetime training, not wartime mobilization. The Framers carefully distinguished between the two because, although they wanted the protection of a central Army in times of national crisis, they feared it in times of peace. Accordingly, they "decentralized" the military by giving to the States the power to appoint officers and to conduct the peacetime training of the Militia "according to the discipline prescribed by Congress." The militia of citizen soldiers, so constituted, is not a quaint relic of antiquity; it is an essential counterbalance to the standing Army of professional soldiers which the Framers uniformly feared, however necessary they thought it to be. See *The Federalist Papers*, No. 46 at 299 (Madison) (noting that the Militia will outnumber the standing army and thus can be counted upon to repel any danger).¹⁰

The reading of the Militia Training Clause that we propose strikes the very balance sought by the Framers

¹⁰ An undue aggregation of power in the federal military may seem implausible today. But no one can foresee what upheavals, economic and otherwise, may lie in store for this Nation which would set the stage for such an occurrence. See Eisenhower, *Farewell Address* (Jan. 17, 1961) ("We must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.") In any event, the Framers chose not to rely wholly on the forbearance and good offices of the Army, but erected a structural safeguard instead.

between overbroad federal control and undisciplined state control over the militia. The Militia Training Clause contemplates a hybrid state/federal militia, with shared control of just the sort that now exists over the National Guard. Thus, the hybrid nature of the National Guard cannot remove it altogether from the restrictions of the Militia Training Clause whenever the federal government waves its "active duty" wand. On the other hand, the Militia Training Clause cannot be read to preclude the federal government from ensuring the combat readiness of the National Guard by prescribing a regime of discipline that includes overseas training. The President's delegated responsibility for the discipline of the National Guard plainly gives him the authority to determine the "location, purpose, type [and] schedule" of training without obtaining the consent of the various state Governors. 10 U.S.C. § 672(f) (1989 Supp.).

We accordingly urge the Court to reject the Government's invitation to decide this case on unnecessarily broad grounds. The Court need look no further than the Militia Training Clause itself to find a sufficient constitutional basis for the Montgomery Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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QUESTION PRESENTED

Whether the governors of the states have a right under the Constitution to prevent units of the United States National Guard from being sent overseas for the purpose of training?

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**IN THE
SUPREME COURT OF THE UNITED STATES**

No. 89-542

RUDY PERPICH, as Governor of
The State of Minnesota,
and
THE STATE OF MINNESOTA,
by its Attorney General
Hubert H. Humphrey, III,
Petitioners,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**BRIEF OF AMICI CURIAE
WASHINGTON LEGAL FOUNDATION,
SENATORS STEVEN D. SYMMS AND
JESSE HELMS, AND CONGRESSMEN
ROBERT K. DORNAN, HERBERT H. BATEMAN,
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LENT, BOB LIVINGSTON, BILL McCOLLUM,
HOWARD C. NIELSON, MICHAEL G. OXLEY,
RON PACKARD, H. JAMES SAXTON, NORMAN D.
SHUMWAY, DENNY SMITH AND BOB STUMP
IN SUPPORT OF RESPONDENTS**

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. WLF engages in litigation and administrative proceedings affecting the broad public interest, and has particular expertise in the area of national security and defense. In that regard, WLF has participated as a party, counsel, or *amicus* in a number of national security cases, and has represented over 200 Members of Congress in many of them. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983); *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1984); *Palestine Information Office v. Shultz*, 647 F. Supp. 910 (D.D.C. 1987), *aff'd*, No. 87-5398 (D.C. Cir. Aug. 5, 1988). Furthermore, WLF filed a brief in the U.S. Court of Appeals for the Second Circuit in *Dukakis v. U.S. Dept. of Defense*, 686 F. Supp. 30 (D. Mass. 1988), 859 F.2d 1066 (1st Cir. 1988) (*per curiam*), *cert. denied*, 109 S.Ct. 1743 (1989).

Senator Steven D. Symms, *et al.*, desire to participate in this case in order to protect their legislative interests under the Constitution. Furthermore, many of the Senators and Congressmen voted in favor of the "Montgomery Amendment" which is the subject of this lawsuit. They object to Petitioners' position in this case because if that position prevails, then governors could seriously undermine our national security by vetoing military training decisions made by the President and the Secretary of Defense with respect to the federal

component of the National Guard, *i.e.*, the United States National Guard.

In accord with Supreme Court Rule 37.1, *amici* has presented arguments that will not be presented by other parties. Furthermore, the views of the Senators and Congressmen contained in the brief provide a unique perspective in this case.

WLF and Senator Symms, *et al.* submit this brief in support of Respondents with the written consent of both parties.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt the Statement of the Case as set forth in Respondents' brief.

SUMMARY OF THE ARGUMENT

The issue in this case is whether the Constitution gives state governors the power to block federal training of the United States National Guard, a reserve component of the United States Army, whenever they disagree with the purpose, type, location, or schedule of such training. *Amici* contend that the answer is no.

Governor Perpich and the state of Minnesota claim that the Militia Training Clause of the Constitution--which reserves the training of "militia" to the states under the discipline prescribed by Congress--allows the Governor of Minnesota to keep units of the Minnesota National Guard from being sent overseas on a training mission if the governor objects to the mission. Petitioners claim that the statute that denies the governors such authority, 10 U.S.C. § 672(f) (the Montgomery

Amendment), is unconstitutional. However, Petitioners fail to acknowledge that the state's authority to train the National Guard is limited in that it must be in accordance to the "discipline prescribed by Congress." Furthermore, the National Guard has a dual status--it is not only a state "militia"; it is also an integral, functioning part of the U.S. Army. When the Guard is ordered into federal service, Congress is exercising its constitutionally assigned power "to raise and support armies." This power was understood by the Framers as well as by this Court to be paramount over a state's training authority over its militia, which can never be used to restrict the military and foreign policies of the federal government.

The argument that the Constitution imposes a gubernatorial consent requirement on the training of a component of the U.S. Army is an utterly insupportable attempt to apply the otherwise laudable concept of "states' rights" to the one area in which it is least appropriate: military affairs. The Petitioners' argument in this case is little more than a veiled attempt to usurp the power of the federal government to conduct foreign policy.

ARGUMENT

I. Introduction.

The issue in this case is whether the Constitution assigns state governors a virtual veto power over the federal government's military objectives in the training of the National Guard. *Amici* contend that the answer is no.

Governor Perpich and the State of Minnesota filed suit in an effort to keep units of the Minnesota National

Guard from being sent to Honduras on a training mission. Specifically, they sought a declaration that the Montgomery Amendment, 10 U.S.C. § 672(f), violates the Militia Training Clause of the United States Constitution (art. I, § 8, cl. 16)¹ insofar as that Amendment restricts the authority of a state governor to withhold consent to training, outside the United States, of members of a state National Guard. The Militia Training Clause authorizes Congress: "To provide for organizing, arming and disciplining the Militia and for governing such part of them as may be in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress." Minnesota so argues even though it admits, as it must, that every member of a state National Guard is also a member of the United States National Guard.²

Although Petitioners frame the issue as if familiar principles of statutory and constitutional interpretation mandate reversal of the court below, Petitioners are actually asking this Court to overturn long established precedent that makes it clear that the Congress has responsibilities for the training of the National Guard.

¹The Militia Clause actually consists of clauses 15 and 16 in Article I, Section 8. The two are commonly referred together in case law and literature as the Militia Clause. Clause 16, standing alone, is commonly referred to as the Militia Training Clause.

²"The National Guard is a component of the organized militia of the United States. 10 U.S.C. § 101. It is a unique military force in that each unit within the Guard is responsible to two governments, one local . . . , and the other federal, i.e., that of the United States." *Penagaricano v. Llenz*, 747 F.2d 55, 56 (1st Cir. 1984). Thus, members of a state National Guard "concurrently hold membership in a distinct federal military organization." *Id.*

Amici respectfully submit that this Court should reject the Petitioners' claims on the grounds that the Montgomery Amendment is a valid assertion of Congressional power under both the Militia Clause (art. I, § 8, cl. 15, 16) and the Army Clause of the Constitution (art. I, § 8, cl. 12), as well as for the reason that the Militia Training Clause gives the governor's authority over the National Guard only when it is operating in its state--as opposed to its federal--status. In short, that clause was never intended to transform state governors into 50 would-be Secretaries of Defense with the power to control our nation's military readiness.

II. The Judiciary Owes the Greatest Possible Deference to Congressional Judgments Concerning National Defense and Military Affairs.

Before discussing the specific basis for the Petitioners' claims, it must be noted that a court is called upon to perform its "gravest and most delicate duty" when, as here, it is asked to review the constitutionality of an Act of Congress. *Blodgett v. Holden*, 276 U.S. 142, 148 (1927) (Holmes, J.). Inasmuch as Congress is "a coequal branch of government whose members take the same oath as [judges] do to uphold the Constitution," courts must accord "great weight to the decisions of Congress." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) [quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973)]. This "customary deference" is even more appropriate in the instant case, since Congress "specifically considered the question" of the

Montgomery Amendment's constitutionality prior to enacting it. *Rostker v. Goldberg*, *id.*¹

However, this is a case deserving more than just the usual deference accorded federal statutes. Rather, "it arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference." *Rostker v. Goldberg*, *id.* at 64-65. The Supreme Court "has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies" [*id.* at 65, quoting *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975)], and has characterized Congress' power "to raise and support armies and to make all laws necessary to that end" as "broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

A great degree of judicial deference to Congress' authority under the Army Clause is further warranted by the fact that "the lack of competence on the part of the courts" in national defense and military affairs "is marked." *Rostker v. Goldberg*, *supra*, 453 U.S. at 65. Indeed,

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military

¹See, e.g., 132 Cong. Rec. H6265 (statements of Reps. Stratton and McKernan), H6267 (statement of Rep. Montgomery) (daily ed. Aug. 14, 1986). See also *Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower & Personnel of the Senate Committee on Armed Services*, 99th Cong., 2nd Sess. (1986) at pp. 3-6, 10-11. (Statement of James H. Webb, Assistant Secretary, Reserve Affairs).

force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (emphasis in original). Thus, while Congress is not "free to disregard the Constitution when it acts in the area of military affairs[,] . . . the tests and limitations may differ because of the military context. . . . [T]he Constitution itself requires such deference to Congressional choice." *Rostker, supra*, 453 U.S. at 67. In light of the above, the court in *Dukakis v. Department of Defense*, 686 F. Supp. 30 (D. Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied sub. nom., Massachusetts v. United States Department of Defense*, 109 S.Ct. 1743 (1989), was entirely right when, addressing this very issue, it stated that:

"In general, disputes are to be resolved through political process (rather than in the courts) where in essence they are disputes as to whether particular calls of units of the militia to temporary active duty, and the location to which such units are sent during such a period, do or do not serve national interests. Absent proof that a body to whom the responsibility and power for deciding such disputes has exceeded constitutional bounds in some way, courts cannot properly intrude." *Id.* at 38.

See also *Schlesinger v. Ballard, supra*, 419 U.S. at 510 ("This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' . . . The responsibility for determining how best our armed forces shall attend to that business rests with Congress, see U.S. Const. Art. I, § 8, cls. 12-14, and with the President.

See U.S. Const. Art. II, § 2, cl. 1") [quoting [*U.S. ex rel.*] *Toth v. Quarles*, 350 U.S. 11, 17 (1955) and citing *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)].

Thus, in assessing the constitutionality of the Montgomery Amendment, this Court must give special deference not only to Congress' judgment that the Amendment was constitutional, but also to Congress' and the President's--as opposed to Governor Perpich's--judgment that our nation's military needs warranted a National Guard training mission in Honduras.

III. The Montgomery Amendment is a Proper Exercise of Congressional Power Under the Militia Clause of the Constitution.

The Militia Clause of the United States Constitution is a careful balancing between the needs of the states and the requirements of the Federal Government. An examination of the debates at the Constitutional Convention and of the ratification debates makes it clear that the Montgomery Amendment is consistent with the original intent of the framers of the Constitution with respect to the balance between state and federal control of the militia.

Governor Perpich and the state of Minnesota argue that the Militia Training Clause gives each of the 50 governors the Constitutional right to prevent the National Guard from the governor's respective state from being sent overseas for training. That argument relies on that portion of the Militia Training Clause which reserves to the states the appointment of the officers and the authority of training. A closer reading of the Militia Clause shows the error in that idea. Clause 16 of Section 8 of Article 1 of the Constitution authorizes Congress to:

To provide for organizing, arming, and disciplining the Militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training, the Militia *according to the discipline prescribed by Congress*. (Emphasis added).

The Petitioners virtually ignore the language of Clause 16, which modifies the states authority to train the militia. That language limits the states authority to train in that the training must be according to the "discipline" prescribed by Congress. That modifying language gives the Congress the authority to direct the states as to how and where to train the National Guard.

The Petitioners claim that "[d]iscipline," as used in the context of the Militia Training Clause, means uniform training exercises and was intended to ensure that states trained the militia according to the same standards." (Pet. Brief 9). The Petitioners argue that "discipline" is limited to a system of drill such as in tactics or drill regulations.

To support Petitioners' interpretation of the intent of the founders, they rely on upon a law review article from 1940 and Congressional reports from 1902 and 1917. However, those sources do *not* support Petitioners' contention.

The law review article cited by Petitioners states that in the early militia acts "discipline" meant a system of drill. Weiner, *The Military Clause of the Constitution*, 54 Harv. L. Rev. 181, 214-215 (1940). However, when the author discusses the meaning of "discipline", he is discussing whether the word "discipline" gives

Congress the authority to regulate courts martial for the state militia. The author is not engaged in a discussion of whether the meaning of the word "discipline" in the 1790s encompassed other forms of training, beyond the manual of arms, such as field maneuvers. The author concludes that, despite the fact that the early militia acts used "discipline" to mean drill, the word had a more expansive meaning and Congress has the power to regulate courts martial as part of its authority to prescribe "discipline." Furthermore, the article concludes that was the understanding of the Founders. Hence, the bottom line is that the author interprets the word "discipline" to mean *more* than merely drill.

The Congressional Report, S. Doc. No. 695, 64 Cong. 2d Sess. 35 (1917) ("The Militia") is also cited by the Petitioners to support their interpretation of the Framers' meaning of the word "discipline." It is a compendium of excerpts from the framers, but expresses *no* view as to the meaning of the word "discipline." Those excerpts support *amici's* understanding of the meaning (*see* discussion *infra* at 12-15). There is nothing in that Congressional Report to indicate that the meaning of "discipline" does not go beyond merely the manual of arms.

Finally, H.R. Rep. No. 1094, 57th Cong., 1st Sess. 19 (1902) is the last authority relied upon by the Petitioners to support the argument that the meaning of "discipline" is limited to the manual of arms. However, that report clearly shows that the authors of that report believed that the word "discipline" extended beyond merely the manual of arms. That report recommends that under the authority of the "discipline prescribed by Congress" that the Congress should allocate funds "to be used for the training of the organized militia in camp duty and field service." The report goes on "to

authorize the participation of the organized militia in the encampments and maneuvers of the Regular Army." The report also calls upon the Secretary of War to make annual estimates of the cost, so that "the authority of Congress to regulate the matter is assured". The report goes to call for "a certain amount of drill and a certain amount of instruction" of the militia. The report lead to the passage of the Dick Act of Jan. 21, 1903, 32 Stat. 775, which was a significant milestone on the road to the modern National Guard (see discussion, *infra*, at 22). There is nothing in the report which limits Congressional authority to the "manual of arms" or "drill" when prescribing "discipline." Rather it supports the proposition that "discipline" includes a wide variety of training.

What were the views of the Framers and the members of the early Congresses about the roles of the states and Congress in the training of the militia?

The Militia Clause is cast in terms of a grant of power to Congress. The term "militia" must be distinguished from the "armies" to be raised and supported by Congress and the "troops" forbidden to be kept by the states in peacetime. What the framers meant by the "militia" was

a home-defense force, composed of most able-bodied men. This force, though armed, was largely untrained, and its deficiencies were the subject of bitter complaint. Even before 1776 had run its course, Washington was warning Congress that 'To place any dependence upon Militia, is, assuredly, resting upon a broken staff.' . . . [M]ilitia came to mean undisciplined and badly regulated forces. Belief in citizen-soldiers became inextricably intertwined with an

undying faith in the martial prowess of untrained men led by political generals. Wiener, *supra*, at 182-3.

Precisely because of the sorry state of the militia, the Framers--in clause 16 of Section 8 or Article I--authorized Congress

to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

In addition, Congress was authorized "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions" (clause 15).

The narrow appointment/training exception to clause 16's otherwise broad grant of authority to Congress was the subject of some debate at the Constitutional Convention in 1787.⁴ Some supporters of the appointment/training exception were motivated by a concern that the uniformity that would result from federal training would render a particular state's militia less adaptable to local conditions.⁵ Others feared that the federal government

⁴See Farrand, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press), vol. II, at 329 *et seq.* and 385 *et seq.*

⁵See, e.g., Farrand, *supra*, at 386 ("Mr. Dayton was against so absolute a uniformity. In some states there ought to be a greater proportion of cavalry than in others. In some places rifles would be most proper, in others muskets. . .").

would neglect the militia.⁶ Still others, according to Alexander Hamilton, believed the provision would have the salutary effect of insuring that officers would be men "who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits, and interests." *The Federalist Papers*, (Mentor, 1961), No. 29 (at 186). Such men would be sure to resist any attempt by the federal government to use them "for the purpose of riveting the chains of slavery upon a part of their countrymen. . . ." *Id.*

With the Militia Training Clause, the Framers acknowledged a role for the states in the training of the militia, but at the same time circumscribed the states' power by limiting such training to that done in accord with the "discipline provided by Congress."

The debates at the Convention concerning the Militia Training Clause make it clear that the "discipline" prescribed by Congress had the potential to limit the state's leeway in training the militia.

One delegate, Mr. Elsworth, expressed his view that ". . . The term discipline was of so vast an extent and might be so expanded as to include all power on the subject." Farrand, *supra*, at 385.

Another delegate, Mr. Gerry, stated that

This power in the U-S as explained is making the States *drill-sergeants*. He had as lief let

⁶See, e.g., *id.* at 387 ("Mr. Luther Martin was confident that the States would never give up the power over the militia; and that, if they were (do so), the militia would be less attended to by the Genl. than by the State Governments").

the Citizens of Massachusetts be disarmed, as to take the command from the states *and subject them to the General Legislature*. It would be regarded as a system of Despotism. *Id.* at 385 (Emphasis added.)

In summary, while the drafters of the Constitution desired to reserve some role to the states, they recognized that the training role would be severely restricted by the Congressional power to prescribe the "discipline" of such training.

The Second Congress indicated a view far different from that propounded by the Petitioners. While military concepts and technology have evolved over time, the drill regulations that the Framers were familiar with took recognition of the fact that drill includes more than merely the manual of arms. Congress, in the Militia Act of 1792 laid out specific and detailed instructions to the states as to how they were to organize the militia, including the instructions as to when the militia were exempt from carrying knapsacks while in training! *Militia Act of 1792*, ch. 33, 1 Stat. 271 (1792). Such instructions are a more extreme form of the "micromanagement" of training by the Congress than merely directing where the National Guard will train.

In the 15th Session of Congress, in 1818, a congressional report stated that "a system of "discipline, comprehending the camp duties, instruction, field exercise, and field service of militia." H.R. Rep. No. 160, 15th Cong., 1st Sess. 675 (1818). That early Congress recognized that "discipline" encompasses much more than merely the manual of arms.

Obviously, the military requirements of 200 years have changed dramatically. However, just as the 15th

Congress recognized it had authority over field exercises, so also Congress today has authority to control the choice of the location of field exercises.

No longer are the militia if mobilized likely to fight in their own states defending their own territory. Instead it is likely that if the National Guard goes into combat it will be in a climate far different from that of Minnesota. In the last twenty years United States Armed Forces have primarily fought in tropical climates--Vietnam, the Dominican Republic, Grenada, Libya and most recently in Panama. The need to train troops in various climates is established military doctrine. As the Court below pointed out, the National Guard now comprise a significant part of the total United States Military forces, including forty-six percent of the combat units and twenty-eight percent of the support forces. *Perpich v. Department of Defense*, 880 F.2d 11, 15 (8th Cir. 1989). It would be military folly to exclude such a large part of our forces from training in foreign climates. That would endanger not only the security of the United States but also those Guardsmen who might be thrust into a combat situation in a tropical climate for which they are untrained and unprepared.

Even Petitioner implicitly adopts the view that the training of the Guard in various climates is required. In their brief, Petitioners quote approvingly the National Guard Bureau that

[N]o governor has said he opposes overseas deployment training--all have said they wholeheartedly believe in it and understand and support the need for it. (Pet. brief. at 45).

More than the intent of the founders and military doctrine support the view that the Militia Clause grants

the Congress extensive powers with respect to the training of the National Guard. Past precedents of this Court also support that view. The Governor and state of Minnesota conveniently ignore the case of *Gilligan v. Morgan*, 413 U.S. 1 (1973), which made clear that the Congress has an important role in the training of the National Guard.

In that case, this Court made it clear that the states power to train the militia was *according to the "discipline" prescribed by Congress*. (emphasis in the original) *Id.* at 6. This court went on to hold that "the training, weaponry and orders of the Guard . . . embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government" *Id.* at 7. *Gilligan* is entirely consistent with the historical meaning of the Militia Clause and the requirements of the Army in the twentieth century.

In summary, the Militia Training Clause does not give the governors a veto power over training missions of the National Guard. The state's powers under the Militia Training Clause are limited in that the training must be in accord with the "discipline prescribed by Congress." At the time of the Constitutional Convention, it was understood that the word "discipline" encompassed more than merely the manual of arms. Early Congresses made it clear that the field exercises were included within the area of the Congressional power to prescribe the "discipline" of the militia's training.

Just as the Militia Clause was a careful balancing act that attempted to balance the interests of the states against the interests of the Federal Government, so also the Montgomery Amendment follows in that tradition as careful balance between the interests of the states and

the national security interests of the entire nation. The Montgomery Amendment permits the state governors to withhold troops from training exercises if they are needed for a domestic emergency within the state.

Hence, this Court can and should sustain the constitutionality of the Montgomery Amendment on the basis that it is a lawful exercise of Congressional power under the Militia Clause pursuant to the Congressional power to prescribe the "discipline" under which training can occur. Sustaining the Montgomery Amendment will serve the requirements of the Department of Defense in time of war yet preserve and retain the important state functions under that clause.

IV. The Army Clause Also Gives the Congress the Authority to Restrict the State Governors from Exercising a Veto Power Over the Training of the National Guard.

The Army Clause (Article 1, Section 8, clause 12), which gives Congress the power "to raise and support armies," is logically placed among the clauses that give Congress the power "to declare war," "to provide and maintain a navy," and "to make rules for the government and regulation of the land and naval forces" (clauses 11, 13, and 14, respectively). The Army Clause also gives the Congress authority to prevent the state governors from exercising a veto power over the training of the National Guard. The only limitation contained in the Army Clause is that "no appropriation of money [to raise and support armies] shall be for a longer term than two years." This limitation reflects the

Framers' concerns about standing armies.⁷ It was thought that requiring Congress to reconsider its funding of troops biennially would be a wholesome check on an army that might otherwise grow ever larger, more costly, and more powerful.⁸

As Alexander Hamilton noted, however, apart from this limitation, Congress' power under the Army Clause and its surrounding clauses was

to exist without limitation, *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* *The Federalist Papers, supra* No. 23 (at 153--Hamilton) (emphasis in original)

Once it is decided that "there ought to be a federal government intrusted with the care of the common defense . . . it will follow that that government ought to be clothed with all the powers requisite to complete execution of its trust." *Id.* at 153-4. Indeed, "there can be no limitation of that authority which is to provide for the defense . . . in any matter essential to the formation, direction, or support of the NATIONAL

⁷"The people in this country cannot forget their apprehensions from a British standing army, quartered in America. . . ." *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People* (1787-1788) (P.L. Ford, ed.), "Examination by Noah Webster," at 51.

⁸See, e.g., *The Federalist Papers, supra*, Nos. 24 (at 185: two-year limitation was "a precaution," "a great and real security against military establishments without evident necessity"--Hamilton) and 41 (at 259: "the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support"--Madison).

FORCES." *Id.* at 154 (emphasis and capitalization in original). Such a limitation would be "both unwise and dangerous." *Id.* at 156. It was in order to enable Congress to implement these powers that the framers assigned Congress the additional power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."⁹ U.S. Const. art. I, § 8, cl. 18.

To ensure that the states would not infringe upon the federal government's plenary authority in the military and foreign policy sphere, the framers included in Article I a "No State shall" section, *i.e.*, section 10, clause 1 of which states, in pertinent part, that "No state shall enter into any treaty, alliance, or confederation [or] grant letters of marque and reprisal," and clause 3 of which specifically forbids a state to "keep troops or ships of war in time of peace, enter into any agreement or compact with any other State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit delay."

In considering the merits of vesting authority over national defense in the federal government as opposed to the states, Hamilton posed the following questions:

⁹Furthermore, these laws, in conjunction with and when made pursuant to the Constitution, were to be "the supreme law of the land[.] . . . anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const., Art. VI, § 2.

See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional").

Is there not a manifest inconsistency in devolving upon the federal government the care of the general defense and leaving in the state governments the *effective* powers by which it is to be provided for? . . . Have we not had unequivocal experience of its effects in the course of the revolution which we have just achieved?¹⁰

The Constitutional provisions discussed above are the incontrovertible proof that the Framers--and the American people--answered Hamilton's questions with a resounding "Yes."

Throughout the early history of our nation's armed services the use of the militia in wartime created a succession of problems. In the Mexican and Spanish American Wars the federal government encountered difficulty sending militia troops to Cuba, Puerto Rico, or the Philippines. To solve the problem, the government relied on militia regiments that divested themselves of their militia status by volunteering for service outside the United States; such volunteer regiments, "independent of state control, eventually made up the bulk of the increased forces. . . ."

After the Spanish American War, with the difficulties of raising troops were still fresh in the memory, the nation took steps "to transform a frontier police into a respected and modern fighting machine . . . a peace

¹⁰*The Federalist Papers*, *supra*, No. 23 (at 156) (emphasis in original). See also No. 25 (at 162-163: To allow military readiness "to be provided for by the State governments, under the direction of the Union . . . would be in reality an inversion of the primary principle of our political association, as it would in practice transfer the care of the common defense from the federal head to the individual members: a project oppressive to some States, dangerous to all, and baneful to the Confederacy"--Hamilton).

establishment suited to the requirements of the United States as a world power." One aspect of this transformation involved the militia, which "was--one hesitates to say reorganized--really organized." The need for such organization was enormous, for, as President Theodore Roosevelt told Congress in 1901, "Our militia law is obsolete and worthless." "Annual Message to Congress," Dec. 3, 1901, quoted in Wiener, *supra*, at 194, n. 71.

The result was the enactment, in 1903, of the Dick Act, 32 Stat. 775. It established an organized militia of the states, to be called the National Guard, "which should conform to the Regular Army organization, be equipped through federal funds, and be trained by Regular Army instructors." *Id.*

The next step in the creation of a modern National Guard was when, pursuant to its authority under the Army Clause, Congress enacted The National Defense Act of 1916, which "federalized" the National Guard, Act of June 3, 1916, 39 Stat. 166, and which has remained "the principal federal legislation affecting the militia, as organized into the National Guard." Kester, "State Governors and the Federal National Guard," 11 Harv. J.L. & Pub. Policy, 117, 187 n.6 (Winter 1988). Thereafter, every officer and enlisted member of the Guard was obliged to take a "dual oath" to support both his country and his state. The oath was needed in order to implement another portion of the Act, which provided for a draft whenever Congress should authorize the use of troops in excess of the regular forces. The effect of the draft was to discharge the Guard member from the state militia and thus render him available for

service abroad.¹¹ As one commentator has noted, "The Act rests on the principle that the right of the states to maintain a militia is always subordinate to the power of Congress 'to raise and support armies' . . ." Corwin, *The Constitution and What it Means Today* (14th rev. ed., 1978), at 118.¹² That principle is more than sufficient for this Court to uphold the constitutionality of the Montgomery Amendment. Congress clearly has the power to prevent the governors from vetoing training requirements of the U.S. National Guard.

Indeed, this Court has upheld this very principle. In *The Selective Draft Law Cases*, 245 U.S. 366 (1918), the Court rejected a claim that the Militia Clause limited Congress' power to draft under the Army

¹¹Under the Army Reorganization Act (June 4, 1920), 41 Stat. 759, the draft provision was amended so that Guardsmen did not have to be discharged from the militia after a draft into federal service.

¹²Federalization of the Guard was not limited to the dual oath and the draft. Indeed, "[t]he scope of federal control authorized by the 1916 Act completely transformed the Guard." Wiener, *supra*, at 200. The Guard was to receive "federal pay for armory drills and administrative work as well as for field encampments. . . . Not only were the states required to conform to the provisions of the law to obtain federal aid, but they were not permitted to maintain troops at all, except as Congress had provided or as the President might, under the authority delegated to him, thereafter direct. And the Guard from now on was not to consist merely of infantry and cavalry units fit only for parades or riot duty. It was to be organized so as to form complete higher tactical units. . . . The Constitutional provision, 'reserving to the States . . . the appointment of the officers,' was sharply curtailed by sections of the Act which prescribed the qualifications of National Guard officers, and made provision for their recognition by the federal authorities and for their elimination in case they should be found disqualified. No officer was eligible to receive federal pay unless he was federally recognized. The states might propose; the army would dispose." *Id.* at 200-201.

Clause. The "fallacy of the argument" made by the Petitioners in that case is precisely the fallacy of the argument made by Petitioners in this case, *i.e.*, the fallacy of "confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different." *Id.* at 382.

This Court noted that one of the primary reasons for replacing the Articles of Confederation with the Constitution had been to supply Congress's

want of power . . . to raise an army. . . . In supplying the power it was manifestly intended to give it all and leave none to the states, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. *Id.* at 381.

The Constitution vested Congress with the discretion as to whether, when, and to what degree it would exercise its power to raise armies; to the states was left "the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies." *Id.* at 382-3. That power "was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required. . . ." *Id.* at 383-4. See also *Cox v. Wood*, 247 U.S. 3 (1918).

By the National Guard Act of June 15, 1933, 48 Stat. 153, Congress--acting under the Army Clause--made the Guard a part of the Army at all times, as opposed to only during war or national emergency. Congress gave the Guard an entirely new status by

constituting it as a reserve component of the Army, to be known as the National Guard of the United States. The purpose of the Act was to avoid having to draft Guardsmen in order for them to enter federal service; they could now simply be *ordered* into federal service as units, and upon release from that service they would revert to their National Guard (state) status.¹³

As a result of the 1933 Act,

the National Guard has today a dual status and every Guardsman is a reservist as well as a militiaman. . . . [T]he 1933 Act proved conclusively that a well-regulated militia is impossible of attainment under the militia clause, and can be organized only by resort to the plenary and untrammelled powers under the army clause. *Weiner, supra*, at 208-209.

This dual enlistment system is central to the very nature of today's Guard, and it has been upheld against constitutional challenge not only by the court below but also in the *Dukakis* case, *supra*, as well as in *Drifka v. Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968) (rejecting claim that members of a state militia could be called forth by Congress only for the three purposes set

¹³Under the 1933 Act, such an order could be given only if Congress declared a national emergency and authorized troops in excess of the regular army. However, in 1940, Congress enacted The Reserve Components Act (Act of August 27, 1940, 54 Stat. 858) authorizing the President to order the National Guard (and the Reserves) into federal service. Absent a statutory prohibition, the Guard--when in federal service pursuant to an "order"--could be used without territorial limitations, the same as the regular army. Army Regulations 130-10, ¶ 130 (March 27, 1940) (cited in Montgomery, "The Relation of the Militia Clause to the Constitutionality of Peacetime Compulsory Military Training," *Va. L. Rev.* 628 at 652-3, n.48 (1945)).

forth in clause 15) and *Johnson v. Powell*, 414 F.2d 1060, 1064 (5th Cir. 1969) (dual enlistment system "was a proper exercise of power necessary and proper to the raising and supporting of armies").¹⁴

The enormous differences between the militia of the eighteenth century and the modern, dual-status National Guard underscore the historical and constitutional problems with the Petitioners' claim that the Framers gave the governors the power to veto the training of the National Guard. That distinction makes it necessary that this Court recognize the power of Congress to authorize the training of the National Guard without interference from the 50 governors.

V. The Montgomery Amendment Is Necessary in Order to Insure that the United States Government Speaks With One Voice.

The Governor and State of Minnesota are not concerned about overseas training of the militia. They have no objection to such training and they recognize the utility of such training. What the Petitioners really object to is the foreign policy goals that were a byproduct of the training. That is clear from their implicit admission that overseas training is required. Petitioners state that the Framers "did intend the states, through

¹⁴In *Powell*, the Court ruled that Congress had properly "provided for a blending of the militia and the army," and that "nothing in the Constitution prohibits the National Guard from functioning in such a dual role." *Id.* at 1063-4. Amici note that, just as the army clause says nothing about *when* Congress may permissibly "raise and support armies," so it says nothing about *how* it shall do so. Furthermore, to the extent that the dual enlistment system enables Congress to maintain a smaller "standing army" than it would otherwise have to, that system accommodates the Framers' concerns in this area.

their control over the state militias, to serve as a check on the abuse of federal military power." Petitioners go on to conclude that "if the states' reserved authority for training indirectly in some way affects foreign policy, it is a permissible effect." The first claim is taking the founders' concerns out of context and the second demonstrates the danger of Petitioners' position. The Founders were concerned that a powerful standing army might run roughshod over the citizens of the states. That concern of the founders arose out of their understanding of the use of armies in Europe. That is not the concern of Governor Perpich. Governor Perpich's attempt to play a role in foreign policy by use of a veto of training would *not* protect the citizens of Minnesota from a domestic threat from the U.S. Army, instead, Gov. Perpich's veto of training would run roughshod over the rights and responsibilities of the Federal Government in the areas of National Defense and Foreign Affairs.

Amici Commonwealth of Massachusetts, *et al.* attempt to minimize the foreign policy concerns of the Federal Government by claiming that the governors of the states have not been able to affect the foreign policy objectives of the Federal Government in the 199 years prior to the passage of the Montgomery Amendment. Apparently, amici Commonwealth of Massachusetts *et al.* are unaware of the Commonwealth's nearly *successful* use of the Militia Clause to interfere with the foreign policy objectives of the United States in the War of 1812. In Senate Report No. 142, Senator Giles made a congressional report which laid out in detail "... the pretensions of the authorities of the States of Massachusetts, Connecticut, and Rhode Island, set up in opposition thereto [the rights and powers of the Government of the United States], if now acquiesced in, might be resumed by the State authorities in the event of a

future war, and thus deprive the Government of the United States of some of its most efficient legitimate means of prosecuting such a war with vigor and effect". S. Rep. No. 142, 13th Cong., 3d Sess. (1815).

Fortunately, the states have not been successful since then in interfering with the foreign policy and national defense of the United States. This Court should not now give the states that power.

The Constitution in Article II, Section 2 appoints the President as Commander in Chief of the Army, to which the National Guard of the United States belongs. Article II also assigns the President substantial authority in foreign affairs. The Constitution gives no such power to the states--indeed, it specifically withholds such power from them (see Article I, Section 10). Allowing state governors to interfere with a President's assigned roles in military and foreign affairs would strike at the heart of Presidential powers in military and foreign affairs.

The Montgomery Amendment, far from being unconstitutional, is a valid and appropriate legislative act that recognizes the President's authority in his constitutionally assigned role while also recognizing the state's interest in keeping the National Guard at home when domestic needs so require.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court uphold the Eighth Circuit's decision.

Respectfully submitted,

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IN THE
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Appellees.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF AMICUS CURIAE
FIREARMS CIVIL RIGHTS LEGAL DEFENSE FUND
IN SUPPORT OF APPELLEES**

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OCTOBER TERM, 1989

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
OF FIREARMS CIVIL RIGHTS LEGAL DEFENSE FUND**

COMES NOW the Firearms Civil Rights Legal Defense Fund, by counsel, pursuant to Rule 37 of the Supreme Court Rules, and hereby moves to file an amicus curiae brief, and in support thereof shows the following:

The interest for the amicus is that the Firearms Civil Rights Legal Defense Fund is a non-profit organization established under Section 501(c)(3) of the Internal Revenue Code to litigate on matters affecting the Second Amendment to the Constitution. It has undertaken substantial historical research on the militia and the intent of the Framers of the Constitution regarding the militia. A primary issue in this case is the meaning of the term "well regulated militia" as used in the Second Amendment and the simple term "militia" as used in Art. I, Section 8 of the Constitution.

A brief of amicus curiae is desirable to alert the court to the intent of the Founding Fathers in framing the militia and army clauses set forth in the Constitution and Bill of Rights. The writer of the brief has published a book and numerous law review articles on the subject, and will provide original research sources which may not be otherwise available to the parties or the court. A similar amicus curiae brief was filed by this counsel in the court below and in the related case of *Dukakis v. U.S. Department of Defense*, U.S. Court of Appeals for the First Circuit, No. 88-1510.

No objection has been received from the appellants, Rudy Perpich *et al.* Counsel for amicus requested from appellants in a letter dated February 8, 1990, for written consent to file an amicus brief. Written consent will be forwarded immediately upon receipt. The Solicitor General on February 13, 1990, consented to the filing of the amicus curiae brief. The written consent is filed separately. The deadline for the reply brief of the appellants has not passed, and no party will be prejudiced by the filing of this brief. Amicus will urge that the result in the court below be affirmed.

Copies of the brief are hereby conditionally filed.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in its motion for leave to file amicus curiae brief and are adopted herein.

SUMMARY OF ARGUMENT

The term "militia" was understood by the framers to mean the armed populace at large. In contradistinction, the framers considered a select militia, like the present National Guard, to be part of the standing army. Since the National Guard is a component of the standing army, and is not the broad based militia as the framers in-

tended, the governor may not object to it being trained in a foreign nation. Therefore, the result reached in *Perpich v. Department of Defense*, 880 F.2d 11 (8th Cir. 1989) (en banc), is correct.

ARGUMENT

I. THE FRAMERS INTENDED THE MILITIA TO BE COMPOSED OF THE POPULACE AT LARGE, AND CONSIDERED A SELECT MILITIA LIKE THE NATIONAL GUARD TO BE PART OF THE STANDING ARMY

A. The Text of the Constitution

As envisioned in the Constitution, the army and the militia are distinct bodies. Art. I, Sec. 8 empowers Congress "to declare War, . . . to raise and support Armies . . . [and] to make Rules for the Government and Regulation of the land and naval Forces. . ." Congress is also empowered:

To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . .

Art. II, Sec. 2 provides: "The President shall be the commander in chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . ." This provision makes clear that there is no national militia, but only a "Militia of the several States." Similarly, the Fifth Amendment provides for grand jury indictment "except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger" Thus, the militia of the several states always retains its status as such, even though it may be called in the "actual service" of the United States for specified domestic purposes.

The Second Amendment guarantees: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The right is guaranteed to "the people," including the militia at all times, and is not limited to "the Militia, when in actual service in time of War or public danger," terms found in the Fifth Amendment. The Second Amendment presupposes that an armed populace encourages a well regulated militia and secures a free state.

Finally, the Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The power to raise armies is delegated to the United States and prohibited to the states, while the power over the militia is reserved exclusively to the states, except as delegated to Congress in Art. I, Sec. 8.

B. Experiences of the Revolution

From the outset of the Revolution in 1775 through the adoption of the Militia Act of 1792, the essential character of the well regulated militia espoused by the Founding Fathers was twofold: (1) it was composed of the people at large, rather than a select group, and (2) its members provided and kept their own arms. By contrast, a small body of trained professionals whose arms were provided by government and which constituted a permanent military establishment was known as a select militia or a standing army. While an Army may be necessary for the common defense, military despotism would be deterred by the constitutional militia composed of the armed populace.

"A well regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen," terms used by George Mason in 1775, exemplify the Founders' conception of the militia. 1 THE PAPERS OF GEORGE MASON 215 (R. Rutland ed. 1970). Most of the colonies used similar language when they resolved that the inhabitants must arm themselves and enroll in the militia. *E.g.*, 1 P. Force, AMERICAN ARCHIVES 1022, 1032 (1837) (Delaware, Maryland). The Virginia Declaration of Rights of 1776, Art. XIII, provided "that a well regulated Militia, composed of the body of the People, trained to Arms, is the proper, natural, and safe Defence of a free State"

C. The Constitutional Convention of 1787

The principles of the Revolution were remembered at the Constitutional Convention of 1787. The members of the convention regarded the militia as an entity of the respective states which would be subject to federal standards, but would be under federal authority only when called out for specified domestic purposes.

To reduce the need for a standing army, George Mason proposed a power "to make laws for the regulation and discipline of the militia of the several states. . . . He considered uniformity as necessary in the regulation of the militia, throughout the Union." 3 J. Elliot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 443 (1845).¹

¹ Similarly, Oliver Ellsworth proposed that "the militia should have the same arms and exercise, and be under rules established by the general government when in actual service of the United States" *Id.* He contended that "the whole authority over the militia ought by no means to be taken away from the states, whose consequence would pine away to nothing after such a sacrifice of power." *Id.* Finally, Ellsworth "considered the idea of a select militia as impracticable; and if it were not, it would be followed by a ruinous declension of the great body of the militia." *Id.* at 444.

Roger Sherman held that "the states might want their militia for defense against invasions and insurrections, and for enforcing obedience to their laws." *Id.* at 445. Mason agreed, moving that the general power would not extend to "such part of the militia as might be required by the states for their own use." *Id.* Mason's proposals were then referred to committee.

When reported back to the convention, the Militia Clause was worded almost exactly as finally adopted in the Constitution. *Id.* at 464. The following explanation ensued:

MR. KING, by way of explanation, said, that by *organizing*, the committee meant, proportioning the officers and men—by *arming*, specifying the kind, size, and calibre of arms—and by *disciplining*, prescribing the manual exercise, evolutions, & . . .

MR. MADISON observed, that "arming," as explained, did not extend to furnishing arms; nor the term "*disciplining*," to penalties, and courts martial for enforcing them. *Id.* at 464-65.

Madison summed up the debate by remarking that "as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia." *Id.* at 466-67. The limited power of Congress thus extends mainly to the adoption of uniform standards for arms and exercises, and to governing the militia when called into federal service for specified purposes.

D. The Debate Between Federalists and Anti-Federalists

The nature of the militia and the army, and the powers of Congress vis-a-vis the states and the people, were fully explicated in the debate between the federalists and anti-federalists. Madison stated it best in *The Federalist* No. 46:

Let a regular army fully equal to the resources of the country be formed, and let it be entirely at the

devotion of the Federal Government; still, . . . the State governments, with the people on their side, would be able to repel the danger. . . . To these [armed forces] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. . . . Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached and by which the militia officers are appointed forms a barrier against the enterprises of ambition more insurmountable than any which a simple government of any form can admit of.

Similarly, in *The Federalist*, No. 29, Alexander Hamilton argued:

Little more can reasonably be aimed at with respect to the people: at large than to have them properly armed and equipped.

. . . This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens.

Tench Coxe, a friend of Madison and a prominent Federalist, argued:

THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are the

militia? are they not ourselves. . . . Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) at 1778-1780 (1976).

Richard Henry Lee ably articulated anti-federalist demands which resulted in the Bill of Rights. Lee, *ADDITIONAL LETTERS FROM THE FEDERAL FARMER* 53 (1788). Lee explained regarding the militia:

A militia, when properly formed, are in fact the people themselves, and render troops in a great measure unnecessary. . . . [T]he constitution ought to secure a genuine [militia] and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include . . . all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided. *Id.* at 169.

In a passage which strikingly anticipates the adoption of the Second Amendment, Lee stated:

These [select] corps, not much unlike regular troops, will ever produce an inattention to the general militia; . . . whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them; nor does it follow from this, that all promiscuously must go into actual service every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle. . . . *Id.* at 170.

E. The State Ratifying Conventions

In the state ratifying conventions, federalists and antifederalists alike stressed the importance of the mil-

itia, but disagreed over whether a bill of rights was necessary. John Smilie warned in the Pennsylvania convention: "Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed." 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (M. Jensen ed. 1976). By contrast, James Wilson argued that the power of Congress was intended to establish a uniformity of arms, not to actually furnish arms (and thus determine who would be armed):

Men without a uniformity of arms, accoutrements, and discipline, are no more than a mob in a camp. . . . If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States. 2 J. Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 521 (Philadelphia 1836).

In the Virginia convention, James Madison argued: "Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repel invasions: these are the only cases wherein they can interfere with the militia" 3 J. Elliott, DEBATES IN THE SEVERAL STATE CONVENTIONS 90 (Philadelphia 1836). Madison assumed that the militia consisted of the whole people:

If resistance should be made to the execution of the laws . . . it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. . . . If insurrections should arise, or invasion should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. *Id.* at 373.²

² Madison also opined that the states retained broad powers over the militia. "I cannot conceive that this Constitution, by giving the

George Mason asked, "who are the militia, if they be not the people of this country . . . ? I ask, Who are the militia? They consist now of the whole people, except a few public officers." Ideally, the militia will always "consist of all classes, high and low, and rich and poor" *Id.* at 425-26.

Based on the above and on debate concerning the right to bear arms, the Virginia convention adopted a proposed Bill of Rights including the following: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state" *Id.* at 659. The New York convention recommended a similar provision which referred to the militia as "the body of the people capable of bearing arms." *Id.*, 1, at 327-28.

Proposals for arms guarantees surfaced in seven state conventions. A survey of these seven proposals indicates that the framers of the Second Amendment had two separate objectives in mind. The first purpose was to recognize in general terms the importance of a militia to a free state. The second purpose was to guarantee a right to keep and bear arms for all traditional purposes, including self-defense. (*Nunn v. State*, 1 Ga. (1 Kel.) 243 (1846), illustrates this early understanding.) The second purpose was plain in the Pennsylvania, Massachusetts, and New Hampshire conventions. The proposals from Virginia, New York, North Carolina, and Rhode Island blended the militia purpose with the pur-

general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive." *Id.* at 382. Similarly, John Marshall observed "that the power of governing the militia was not vested in the states by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been." *Id.* at 421.

pose to guarantee to the people the right to keep and bear arms.

F. The Adoption of the Second Amendment

James Madison first reviewed proposals from the state conventions before he proposed to the House of Representatives a bill of rights that included the following: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 ANNALS OF CONGRESS 434 (June 8, 1789).²

The House Committee on Amendments reported Madison's proposal in this form: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." 1 ANNALS OF CONGRESS 750 (Aug. 17, 1789). In debate that followed, Elbridge Gerry objected to the last phrase because "Congress can declare who are those religiously scrupulous and prevent them from bearing arms." He added:

What, sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Con-

² Ten days later, Tench Coxe published his "Remarks on the First Part of the Amendments," *Federal Gazette & Philadelphia Evening Post*, June 18, 1789, at 2, col. 1, which explained the above as follows: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms." Madison praised the article. 12 MADISON PAPERS 239-240, 257 (1979).

gress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. *Id.*

Furthermore, on Wednesday, September 9, 1789, a motion in the Senate to insert "for the common defence" next to the words "bear arms" was defeated. JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (Gales & Seaton 1820). Thus, an effort to restrict the right was defeated.

The view that the final language for the Second Amendment was a compromise to satisfy all competing objectives of the framers is bolstered by the recent discovery in James Madison's papers of an early draft of the Bill of Rights, in Roger Sherman's handwriting, which provided for a militia but no right to keep and bear arms. N.Y. Times, July 29, 1987, p. A1. The Framers' ultimate decision not to adopt the Sherman proposal indicates that they felt it was inadequate.

As adopted, the Second Amendment was devoid of any language that would allow Congress to disarm law-abiding persons. It clearly expresses the idea that a well regulated militia is composed of the armed populace. The Second Amendment intended "for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the rights of the people." Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. History 599, 614 (1982). See also Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637 (1989); Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. Law & Politics 1 (1987); Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987); S.

Halbrook, *THAT EVERY MAN BE ARMED* 76 (Univ. N. Mex. Press 1984); Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 287 (1983); Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okl. L. Rev. 65 (1983); Sprecher, *The Lost Amendment*, 51 Am. Bar Assn. J. 554 & 665 (1965) (2 parts). The Addendum contains a list of scholarly literature on the Second Amendment.

G. The First Federal Militia Act

The federal Militia Act of May 8, 1792 required every "free able bodied white male citizen" to provide himself with a good musket or firelock" In House debate, Rep. Parker objected that this would be impractical for poor persons, who should thus be armed at federal expense. 2 ANNALS OF CONGRESS 1804 (Dec. 16, 1790). Rep. Sherman argued that "the people of America would never consent to be deprived of the privilege of carrying arms." *Id.* at 1805. He explained:

What relates to arming and disciplining means nothing more than a general regulation in respect to the arms and accoutrements. There are so few freemen in the United States who are not able to provide themselves with arms and accoutrements, that any provision on the part of the United States is unnecessary and improper. He had no doubt that the people, if left to themselves, would provide such arms as are necessary, without inconvenience or complaint; but if they are furnished by the United States, the public arsenals would soon be exhausted . . . *Id.* at 1806.

The ultimate objection to a government-armed populace was expressed by Rep. Wadsworth: "Is there a man in this House who would wish to see so large a proportion of the community, perhaps one-third, armed by the United States, and liable to be disarmed by them?" *Id.* at 1809.

Rep. Fitzsimons moved to strike the words "provide himself" and amend the bill to read that every citizen "shall be provided" with arms. Madison and others objected that this "would leave it optional with the States, or individuals, whether the militia shall be armed or not." "This motion was lost by a great majority." *Id.* at 1809. Thus, the first Congress to pass legislation under the Militia Clause, saw the militia as the body of the citizens, who kept their own arms.

II. APPLICATION OF THE TEXT AND FRAMERS' INTENT TO THE STATUTORY SCHEME

According to the text of the Constitution and Bill of Rights as amplified by the intent of the framers, the following factors are associated with the term "militia":

1. Consists of "the people," i.e., all able bodied persons capable of bearing arms.
2. Its members are civilians primarily.
3. They provide their own arms.
4. They privately own these arms.
5. They keep these arms in their homes.
6. Their keeping and bearing of arms is not limited to actual militia service.
7. Its federal function is to execute the laws, suppress insurrections, and repel invasions.

By contrast, the following are characteristics of a standing army, including a select militia:

1. Consists of a distinct and select group, full or part time.
2. It is a permanent military establishment.
3. The federal government provides the arms.
4. The federal government owns the arms.
5. The arms are secured in armories and are subject to federal recall.

6. The arms are borne only in professional military training and service.

7. Its function is war.

10 U.S.C. Sec. 311 provides that "the militia of the United States consists of all able-bodied males" ages 17 through 44, including the "organized militia" (National Guard and Naval Militia) and "unorganized militia" (all others). The following further definitions are provided in 10 U.S.C. Sec. 101:

(9) "National Guard" means the Army National Guard and the Air National Guard.

(10) "Army National Guard" means that part of the organized militia of the several States . . . , active and inactive, that-

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(11) "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

Finally, 10 U.S.C. Sec. 672(b) and (d) provides as to the Army National Guard of the United States that members or units "may not be ordered to active duty under this subsection without the consent of the governor of the State" involved. Recently adopted Sec. 672(f) limits the consent required, leading to the present controversy. However, if the Guard is a component of the armed forces, then the governor may not object to its being trained abroad; only if the Guard is part

of the militia as constitutionally defined may the governor object.⁴

In recognizing the fundamental distinction between the army and the militia, the Constitution does not anticipate that the organized militia will be a reserve component of the Army. Although the statute may declare the National Guard to be the organized militia of the several states, that does not make it so under the Constitution, any more than would a statute that declared soldiers under active duty to be the militia. Further, the statute declares the Army National Guard of the United States to be a reserve component of the Army, clearly distinguishing it from the constitutional militia.

When the National Guard is not on active duty as part of the Army, it ostensibly has a hybrid status as a state militia. However, its full-time status as a reserve component of the Army, and its strong dependence on the federal government, make it far more akin to a select militia which is really part of the Army, than the constitutional militia of the respective states envisioned by the framers. The historical development of the militia and the Guard exhibits a consistent parting of the ways between the two.

The only detailed opinion by the U.S. Supreme Court on the nature of the militia and the Second Amendment, *United States v. Miller*, 307 U.S. 174 (1939), does not even mention the National Guard. *Miller* concluded:

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of the Colonies and States, and

⁴This is not the only area in which the Constitution requires a distinction between the armed forces and the militia. The armed forces may engage in war, but may not be called out to enforce the laws, a function reserved to the militia under Art. I, Sec. 8. *E.g.*, 18 U.S.C. Sec. 1385 punishes "Whoever . . . willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws"

the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time. *Id.* at 178-179.⁵

Recent scholarship further contrasts the National Guard from the militia as originally intended. *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution*, Senate Judiciary Committee, 97th Cong., 2d Sess. at 7 (1982) states:

In the Militia Act of 1792, the second Congress defined "militia of the United States" to include almost every free adult male in the United States. . . . This statute, incidentally remained in effect into the early years of the present century as a legal requirement of gun ownership for most of the population of the United States. There can be little doubt from this that when the Congress and the people spoke of a "militia", they had reference to the traditional concept of the entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard. . . . From this militia, appropriate measures might create a "well regulated militia" of individuals trained in their duties and responsibilities as citizens and owners of firearms.

After the Civil War, the militia as envisioned in the Constitution came to be relied upon less and less. Wiener, *The Militia Clause of the Constitution*, 54 Har. L. Rev. 181, 191 (1940) states: "The militia contemplated by the

⁵ *Maryland v. United States*, 381 U.S. 41, 46 (1965) held: "The National Guard is the 'modern Militia reserved to the States. . . ." In view of *Miller* and the federal statutory provisions, it is clear that, to the degree *Maryland* goes beyond holding that the National Guard is the "organized militia"—which is only as far as the Court needed to go to decide the case—the statement is dictum.

Act of 1792, that is, the whole body of the people, virtually ceased to exist, and the States relied more and more upon select bodies of men . . . who became known as National Guards. The Guards devoted itself . . . with distressing regularity, to strike duty. . . ." ⁶ Even so, the Guard was not part of the federal Army at that time, and was defined by state law as a part of the general militia of the people at large.⁷

The Dick Act of 1903 began the transformation of the Guard from part of the militia of the states to a component of the Army. S. Ambrose, *THE MILITARY AND AMERICAN SOCIETY* 245 (1972) states:

The Dick Act almost completely negated the original purpose of the militia, for the Founding Fathers saw the militia as a liberal agency that would act in

⁶ M. Derthick, *THE NATIONAL GUARD IN POLITICS* 16-17 (1965) states:

Both observers in the 1880's and subsequent students have identified the labor riots of 1877 as the cause of the Guard's sudden growth. . . . Development of the Guard began and proceeded fastest in the populous, industrial states of the North.

The Guards received substantial private funds from wealthy businessmen. . . . Officers of the Guard in all of the states appear to have been business and professional men, representative of the "better classes."

Derthick further notes that in the years after 1920, "the Guard served the interests of business in conflicts with labor. It saw frequent service in strikes. . . . It was attacked as the private army of big business." *Id.* at 51-52. This may explain the disuse of the people at large as militia.

⁷ *State v. Wagener*, 77 N.W. 424, 425 (Minn. 1898) states: "Under our Military Code, the active militia or national guard . . . come from the body of the militia of the state. . . ." Accord, *State v. Grayston*, 163 S.W.2d 335, 337 (Mo. 1942) ("the term 'militia' was not used as restricted to the National Guard" but includes "every able-bodied citizen").

Current state constitutional and statutory provisions relating to the militia are listed in the Addendum to this brief.

defense of individual and local liberty against the power of the Federal Government. The Founding Fathers, in fact, reflecting their deep suspicion of standing armies, went to great lengths to insure that the Federal Government would not have a monopoly on violence. On an individual level, they guaranteed citizens the right to bear arms; on the organized level, they encouraged the development of state militia units in order to provide a counter-power to the U.S. Army.

The Act of June 15, 1933, 48 Stat. 153, 155 created the National Guard of the United States as a reserve component of the U.S. Army. This enactment was pursuant to the power to "raise and support armies," not the Militia Clause. H.R. Rpt. No. 141, 73rd Cong., 1st Sess. at 2-5 (1933). As stated in *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution, supra* at 11:

The "militia" itself referred to a concept of a universally armed people, not to any specifically organized unit. When the framers deferred to the equivalent of our National Guard, they uniformly used the term "select militia" and distinguished this from "militia". Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia.

That the National Guard is not the "Militia" referred to in the second amendment is even clearer today. Congress has organized the National Guard under its power to "raise and support armies" and not its power to "Provide for organizing, arming and disciplining the Militia". This Congress chose to do in the interests of organizing reserve military units which were not limited in deployment by the strictures of our power over the constitutional militia, which can be called forth only "to execute the laws of the Union, suppress insurrections and repel

invasions." The modern National Guard was specifically intended to avoid status as the constitutional militia, a distinction recognized by 10 U.S.C. Section 311(a).⁸

Since the Army National Guard of the United States is a component of the Army, the states have no authority over it whatever, and the consent of a state governor for training exercises abroad is not constitutionally required. Consequently, Art. I, Section 8, Cl. 16, which reserves to the states (without exception) "the authority of training the militia" is irrelevant here.

Both federal and state statutes declare that the very same force which is a component of the Army, nonetheless constitutes the organized militia of the states. However, the training of Guard units abroad has been undertaken under the Army and Necessary and Proper clauses, not under clause 16 which provides that Congress may govern such part of the militia "as may be employed in the service of the United States." Moreover, the Constitution distinguishes the Army from the Militia, and does not anticipate that they may be one and the same. The characteristics of the Guard as part of the Army clearly predominate over its characteristics as part of the militia of the respective states. Taken as a whole, the National Guard is not the constitutional militia as intended by the

⁸ E. Colby and J. Glass, *The Legal Status of the National Guard*, 29 Va.L.Rev. 839, 840 (1943) states:

A separation of the National Guard from the militia idea is the first and most necessary step. The confusion between these two has been the cause of much error. . . . By [1933], although there had long been a National Guard, there was, practically speaking, no militia.

The article concluded "that the National Guardsmen are actually federal troops in every sense of the word." *Id.* at 852.

framers.⁹ Consequently, the Militia Clause has no application here.

CONCLUSION

The Court should affirm the decision of the Court of Appeals, but on such grounds as more precisely identifies the constitutional status of the National Guard as a component of the U.S. Army and not the Militia, which consists of the people at large.

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⁹ During both world wars, when the National Guard units were mobilized, the states had to rely on self-armed citizens and to organize their own state protective forces for defense from invasion and against sabotage, and to keep order. *E.g.*, M. Schlegel, VIRGINIA ON GUARD: CIVILIAN DEFENSE AND THE STATE MILITIA IN THE SECOND WORLD WAR (1949); U.S. HOME DEFENSE FORCES STUDY at 58 (Office of Sec. of Defense, 1981); Dowlut & Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okl. City Univ. L. Rev. 177, 197, 233-35 (1982). The organization of state defense forces for militia needs has been the subject of proposed legislation. *E.g.*, H.R. 2581 (Traficant, June 2, 1987); H.R. 3068 (Skelton, July 30, 1987).

APPENDICES

APPENDIX A

LITERATURE ON RIGHT TO BEAR ARMS

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McClure, *Firearms And Federalism*, 7 Idaho L. Rev. 197 (1970)

Levine & Saxe, *The Second Amendment: The Right To Bear Arms*, 7 Houston L. Rev. 1 (1969)

Olds, *The Second Amendment And The Right To Keep And Bear Arms*, 46 Mich. St. Bar J. 15 (Oct. 1967)

Comment, *The Right To Keep And Bear Arms; A Necessary Constitutional Guarantee Or An Outmoded Provision Of The Bill of Rights?*, 31 Albany L. Rev. 74 (1967)

Sprecher, *The Lost Amendment*, 51 Am. Bar Assn. J. 554 & 665 (2 parts) (1965)

Hays, *The Right To Bear Arms, A Study In Judicial Misinterpretation*, 2 Wm. & Mary L. Rev. 381 (1960)

APPENDIX B

STATE MILITIA PROVISIONS

	STATE CONSTITUTION	STATUTES
Alabama	Const. of 1875 Art. 12 § 1 (const. of 1901 Art. 15) *(LP)	Alabama Code 1975 § 31-2-2
Alaska	nothing	Alaska Statutes 1978 Title 26 § 2605.010
Arizona	Const. (from stat. 1956) Article 16 § 1	Arizona Rev. Statutes Ann. 1956 Title 26 Article 2 § 26-121
Arkansas	Const. of 1874 Article 11 § 1	Arkansas Stat. Ann. 1947 § 11-102
California	Const. of 1879 as amended Article 8 § 1 (LP)	West's Cal. Code Ann. 1955 § 121-122
Colorado	Const. of 1876 Art. 17 § 1	nothing
Connecticut	nothing	Conn. Gen. Stat. Ann. (1975) Chapter 504 § 27-1, § 27-2
Delaware	nothing	Del. Code Ann. Rev. 1974 Title 20 ** nothing
District of Columbia	nothing	D.C. Code § 39-101
Florida	Const. Article 10 § 2	West's Fla. Stat. Ann. 1975 Title 16 ch. 250 § 250-02
Georgia	Const. Art. 3 § 11 ¶ 1 (*Gen. Assem.)	Official Code of Ga. Ann. 1971 § 38-2-3
Hawaii	nothing	Hawaii Rev. Statutes 1976 Title 10 ch. 121 § 121-1
Idaho	Const. Art. 14 § 1	Idaho Code § 46-102
Illinois	Const. of 1970 Art. 12 § 1	Smith-Hurd Ill. Ann. Stat. (1953) Ch. 29 Art. 1 § 1

Indiana	Const. Art. 12 § 1	Burns Ind. Stat. Ann. Title 10 Art. 3 ** <i>nothing</i> <i>nothing</i>
Iowa	Const. of 1857 Art. 6 § 1	
Kansas	Const. Art. 8 § 1	Kansas Stat. Ann. 1976 Ch. 48 Art. 1 § 48-101
Kentucky	Const. § 219	Kentucky Stat. Ann. 1980 Title 5 Ch. 37 § 37.170
Louisiana	<i>nothing</i>	West's La. Rev. Stat. (1975) Title 29 Ch. 1 § 3
Maine	Const. Art. 7 § 4	Maine Rev. Stat. Ann. Title 37-A Ch. 9 § 37-A-251
Maryland	<i>nothing</i>	Ann. Code of Md. Art. 65 § 1
Massachusetts	<i>nothing</i>	Mass. Gen. Laws Ann. Title 5 Ch. 33 § 2
Michigan	Const. of 1963 Art. 3 § 4 (*LP)	Mich. Compiled Laws Ann. § 32.1
Minnesota	Const. of 1974 Art. 13 § 1 (*LP)	Minnesota Stat. Ann. § 190.06
Mississippi	Const. of 1963 Art. 9 § 214	Miss. Code Ann. 1972 Chapter 5 § 33-5-1
Missouri	Const. of 1945 Art. 3 § 46 (*Gen. Assem.)	Vernon's Ann. Mo. Stat. 1969 Title 5 ch. 41 § 41.050
Montana	Const. Art. 6 § 13 ("military force shall consist of all able bodied citizens of state except those exempt by law")	Mont. Code Ann. Title 10 Ch. 1 ** <i>nothing</i>
Nebraska	Const. Art. 14 § 1 (*LP)	Rev. Stats. of Neb. Ch. 55 § 55-106
Nevada	Const. Art. 12 § 1 (*LP)	Nev. Rev. Stat. ch. 412 § 412.026

New Hampshire	Const. Art. 24 <i>nothing</i>	N. Hamp. Rev. Stat. Ann. (1977) Title 8 Ch. 110 § 110-A:1
New Jersey	Const. of 1947 Art. 5 § 3 ¶ 1 (*LP)	N.J. Stat. Ann. (1968) § 38A:1-2
New Mexico	Const. Art. 18 § 1	N.Mex. Rev. Stat. (1978) § 20-2-2
New York	Const. Art. 12 § 1	McKinney's Con. Laws of N.Y. Ann. Book 35 Art. 1 § 2
North Carolina	<i>nothing</i>	General Stat. of N.C. (1981) Ch. 127-A § 127A-1
North Dakota	Const. Art. 11 § 16	N. Dakota Century Code Ann. 1972 § 37-02-01
Ohio	Const. Art. 9 § 1	Baldwin's Ohio Rev. Code Ann. Title 59 ch. 5923 § 5923.01
Oklahoma	Const. Art. 5 § 40 (*LP)	Oklahoma Stat. Ann. Title 44 Art. 3 § 41
Oregon	Const. Art. 10 § 1 (*LP)	Oregon Rev. Stat. (1981) § 396.105
Pennsylvania	<i>nothing</i>	Purdon's Penn. Stat. Ann. 1969 Title 51 Art. 2 § 1-201
Rhode Island	<i>nothing</i>	General Laws of R.I. Title 30 Ch. 1 § 30-1-2
South Carolina	Const. Art. 13 § 1	Code of Laws of S. Carolina 1976 § 25-1-60
South Dakota	Const. Art. 15 § 1	S. Dakota Codified Laws § 33-2-2
Tennessee	Const. Art. 4 § 1 ('all male citizens shall be subject to performance of military duty as prescribed by law')	Tenn. Code Ann. 1980 § 58-1-104

Texas	Const. of 1876 Art. 16 § 46 (*LP)	Vernon's Texas Civil Stat. Ann. 1962 Title 94 Art. 5766
Utah	Const. Art. 15 § 1	Utah Code Ann. 1981 ed. § 39-1-1 <i>nothing</i>
Vermont	Const. Ch. 2 § 55 (*LP)	Code of Virginia 1981 Title 44 § 1
Virginia	Const. Art. 1 § 13 <i>nothing</i>	Rev. Code of Wash. Ann. 1964 § 38.04.030
Washington	Const. Art. 10 § 1	West Va. Code 151-13-1 ** <i>nothing</i>
West Virginia	<i>nothing</i>	West's Wisc. Stat. Ann. 1972 § 21.01
Wisconsin	Const. Art. 4 § 28 (*LP)	Wyoming Stat. Ann. 1977 § 19-2-102
Wyoming	Const. Art. 17 § 1	

* LP constitutional provision for legislature or general assembly to determine organization of militia.

** Code section numbers followed by "*nothing*"—militia section of code contained no specifics on organization.